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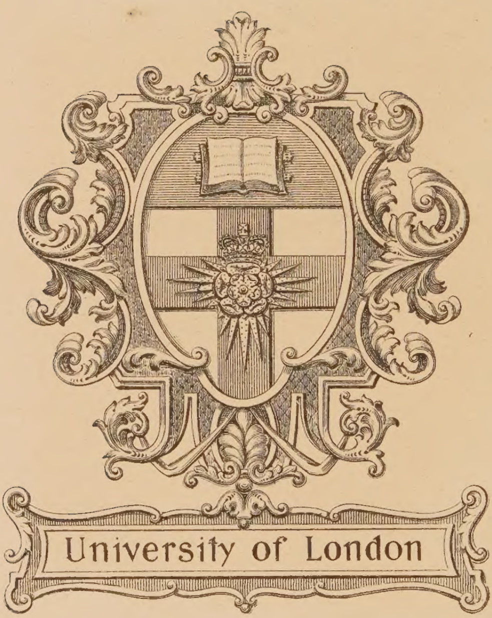
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1906.

6 Edw. 7, c. 41 (*Marine Insurance*), s. 49, sub-s. 1 (*a*), (*b*); s. 60. FORESTAL LAND, TIMBER AND RAILWAYS CO., LD. *v.* RICKARDS, &c. - **C. A. 225**

1910

10 Edw. 7, c. 8 (*Finance* (1909-10)), s. 74, sub-s. 1. ASSOCIATED BRITISH ENGINEERING, LD. *v.* INLAND REV. COMMISSIONERS - **Lawrence J. 15**

1911.

1 & 2 Geo. 5, c. 50 (*Coal Mines*), s. 102, sub-s. 8. YELLAND AND OTHERS *v.* POWELL DUFFRYN ASSOCIATED COLLIERIES, LD. - - **C. A. 154**

1913.

3 Geo. 5, c. 3 (*Provisional Collection of Taxes*), s. 1, sub-s. 1. NESTA, LD. *v.* WYATT AND ANOTHER **Macnaghten J. 44**

1918.

8 & 9 Geo. 5, c. 40 (*Income Tax*), s. 211, sub-s. 2; All Schedules Rules, r. 21, sub-r. 1. NESTA, LD. *v.* WYATT AND ANOTHER **Macnaghten J. 44**

—— —— —— Sch. D, Case I. SOUTHERN *v.* BORAX CONSOLIDATED, LD. **Lawrence J. 111**

—— —— —— Sch. D, 1 (*b*). WOOD *v.* OWEN - - **Lawrence J. 92**

—— —— —— Sch. D, Case I. Rules applicable to Cases I. & II., r. 3. COPEMAN *v.* FLOOD (WILLIAM) & SONS, LD. - - **Lawrence J. 202**

8 & 9 Geo. 5, c. 40 (*Income Tax*), Sch. D, Case III. Sothern-Smith *v.* Clancy **C. A. 276**

——— ——— ——— Sch. E, r. 1. Corbett *v.* Duff. Dale *v.* Duff. Feeberg *v.* Abbott - - **Lawrence J. 730**

——— ——— ——— Sch. E, Rules applicable to Sch. E, rr. 6, 18. McMillan *v.* Guest - - - **C. A. 258**

1919.

9 & 10 Geo. 5, c. 69 (*Industrial Courts*), s. 8. Rex *v.* National Arbitration Tribunal. *Ex parte* Bolton Corporation - **Divl. Ct. 584**

1922.

12 & 13 Geo. 5, c. 17 (*Finance*), s. 21. Inland Revenue Commissioners *v.* Payton - - - **C. A. 363**

12 & 13 Geo. 5, c. 19 (*Gaming*), s. 1. Brueton *v.* Woodward **Singleton J. 680**

1923.

13 & 14 Geo. 5, c. 14 (*Finance*), s. 24. Inland Revenue Commissioners *v.* Payton - - **C. A. 363**

13 & 14 Geo. 5, c. 32 (*Rent and Mortgage Interest Restrictions*), s. 2, sub-ss. 1, 3. Mouser *v.* Major - **C. A. 477**

1924.

(*Australian Sea Carriage of Goods*), s. 9. Ocean Steamship Co., Ld. *v.* Queensland State Wheat Board **C. A. 402**

1925.

15 & 16 Geo. 5, c. 49 (*Supreme Court of Judicature* (*Consolidation*)), s. 89 (*a*). Caine *v.* Hinckes - **Asquith J. 21**

15 & 16 Geo. 5, c. 84 (*Workmen's Compensation*), s. 9. Cole *v.* United Dairies (London), Ld. - **C. A. 100**

——— ——— s. 9, sub-s. 2 (i.); s. 10, rr. (i.), (iii.). Cocker *v.* Sheffield Corporation - - - **C. A. 715**

——— ——— s. 9, sub-s. 3 (i.). R. Hoe & Co., Ld. *v.* Dirs - - **C. A. 34**

——— ——— ——— Doncaster Amalgamated Collieries *v.* Leach - **C. A. 649**

——— ——— s. 13. Davis *v.* Cambrian Wagon Works, Ld. - **C. A. 444**

——— ——— s. 43, sub-s. 1 (*b*). Birch *v.* Pease & Partners, Ld. **C. A. 615**

15 & 16 Geo. 5, c. 90 (*Rating and Valuation*), s. 38. Rex *v.* Westminster (City) Assessment Committee. *Ex parte* Grosvenor House (Park Lane), Ld.- - - **C. A. 53**

1926.

16 & 17 Geo. 5, c. 53 (*Merchandise Marks*), ss. 1, 5. London Armoury Co., Ld. *v.* Ever-Ready Co. (Great Britain), Ld. - **Tucker J. 742**

1927.

17 Geo. 5, c. 4 (*Royal and Parliamentary Titles*), s. 2, sub-s. 2. Rex *v.* Gordon-Finlayson. *Ex parte* An Officer - - **Divl. Ct. 171**

17 & 18 Geo. 5, c. 37 (*Road Transport Lighting*), s. 1, sub-s. 1; s. 15. Bugge *v.* Taylor - **Divl. Ct. 198**

1928.

18 & 19 Geo. 5, c. lxxvii. (*London County Council* (*General Powers*)), s. 33. Lyus *v.* Stepney Borough Council **C. A. 134**

1930.

20 & 21 Geo. 5, c. 43 (*Road Traffic*), s. 50. Maguire *v.* Crouch **Divl. Ct. 108**

1932.

22 & 23 Geo. 5, c. 48 (*Town and Country Planning*), s. 18, sub-s. 1 (*a*). Bury *v.* Epping R. D. C. and Another - - **Div. Ct. 212**

22 & 23 Geo. 5, c. 51 (*Sunday Entertainments*), ss. 3, 4, 5. Rex *v.* Britton and Others. *Ex parte* Newton **Divl. Ct. 8**

1933.

23 & 24 Geo. 5, c. 32 (*Rent and Mortgage Interest Restrictions* (*Amendment*)), s. 3, First Schedule, para. *g* (i.). Read *v.* Gordon - **C. A. 495**

1934.

24 & 25 Geo. 5, c. 41 (*Law Reform* (*Miscellaneous Provisions*)), s. 1, sub-s. 5. Yelland *v.* Powell Duffryn Associated Collieries, Ld. (No. 2) **C. A. 519**

24 & 25 Geo. 5, c. 50 (*Road Traffic*), s. 10, sub-ss. 1, 3. Merchants & Manufacturers Insurance Co., Ld. *v.* Hunt and Others **C. A. 295**

24 & 25 Geo. 5, c. 53 (*County Courts*), s. 47, sub-s. 3. Caine *v.* Hinckes **Asquith J. 21**

1935.

25 & 26 Geo. 5, c. 47 (*Restriction of Ribbon Development*), s. 9, sub-ss. 1, 4. Gibson *v.* Norfolk County Council - - **Divl. Ct. 191**

1936.

26 Geo. 5 & 1 Edw. 8, c. 34 (*Finance*), s. 20. INLAND REVENUE COMMISSIONERS *v.* PAYTON - - - **C. A. 363**

1937.

1 Edw. 8 & 1 Geo. 6, c. 67 (*Factories*), s. 151, sub-ss. 1, 9. WESTON *v.* LONDON COUNTY COUNCIL **Wrottesley J. 608**

1938.

1 & 2 Geo. 6, c. 46 (*Finance*), s. 38, sub-ss. 3, 4. INLAND REVENUE COMMISSIONERS *v.* GAUNT **Lawrence J. and C. A. 706**

1939.

2 & 3 Geo. 6, c. 21 (*Limitation*), s. 2, sub-ss. 1 (*a*), 3. BRUETON *v.* WOODWARD - **Singleton J. 680**

2 & 3 Geo. 6, c. 67 (*Courts* (*Emergency Powers*)), s. 1, sub-s. 2; s. 7. SMALLMAN *v.* EMBASSY CINEMA (TOTTENHAM COURT ROAD), LD. **C. A. 419**

2 & 3 Geo. 6, c. 72 (*Landlord and Tenant* (*War Damage*)), s. 6, sub-s. 1; s. 24. BOUDOU *v.* THORNTON-SMITH **C. A. 561**

—— —— s. 6, sub-s. 1; s. 11, sub-s. 1. COOPER *v.* JAX STORES, LD. **C. A. 577**

—— —— s. 11, sub-s. 1 (*b*). TURNER *v.* STELLA BOND, LD. - **C. A. 569**

2 & 3 Geo. 6, c. 94 (*Local Government Staffs* (*War Service*)), s. 1, sub-ss. 1, 2. REX *v.* NATIONAL ARBITRATION TRIBUNAL. *Ex parte* BOLTON CORPORATION - **Divl. Ct. 584**

—— —— c. 89 (*Trading with the Enemy*), s. 1, sub-s. 2 (*a*) (ii.) and (iii.). STOCKHOLMS ENSKILDA BANK AKTIEBOLAG *v.* SCHERING, LD. - **C. A. 424**

1940.

3 & 4 Geo. 6, c. 38 (*Truck*), s. 1. CAMERON *v.* ROYAL LONDON OPHTHALMIC HOSPITAL - **du Parcq L.J. 350**

C. A.
1940
WILLIAMS
v.
BOAG.

There is nothing in Order XXII., r. 6, which prohibits communication to a Judge on an interlocutory application of the fact that money has been paid into court.

APPEAL from an order of Singleton J. for the payment out to the plaintiff, the respondent, of money paid into court by the defendant.

The action was on a policy of marine insurance effected with the defendant and other underwriters. The insurance was against risks incurred while a steam trawler was lying at West Mersea. The trawler being injured a claim was made, and the defendant paid 100*l.* into court with a notice of admission of liability on March 4, 1940. Subsequently it was discovered that the accident had occurred while the trawler was lying at Brightlingsea, and that, consequently, the defendant admittedly had an absolute defence, the risk never having attached. The defendant then on June 18, 1940, obtained an order from Singleton J. under Order XIX., r. 27, amending his defence by the withdrawal of the notice of admission of liability, the Judge not being informed of the fact of the payment into court, owing to the supposed prohibition contained in Order XXII., r. 6, which enacts that "No communication of [the fact that money has been paid "into court] shall at the trial of any action be made to the "Judge . . . . until all questions of liability and amount of "debt or damages have been decided."

The plaintiff not having exercised his right to take the 100*l.* out of court under Order XXII., r. 2, sub-r. 1, within seven days, then, under Order XXII., r. 3, the money could not be paid out except on an order of the Court or a Judge. Accordingly on July 15, 1940, the plaintiff applied to Singleton J. for payment out, who made the order now appealed against. The appeal was heard on September 20, 1940.

Patrick Devlin for the appellant.
Cyril Miller for the respondent.

MACKINNON L.J. It is not necessary to deal with this case in any great detail. The only point that I think is worth noticing is the difficulty that is said to arise under the provisions of the rules under Order XXII., with regard to payment into court. I do not agree that, if a man has paid money into court with an admission of liability, and subsequently has found that he has made a mistake and gets leave to amend his defence it is then impossible for him to come to the Court in some way or other and say: "Having regard to the new "defence that I have been allowed to put up denying liability, "I ought to have liberty to withdraw that notice of admission "of liability and safeguard my right ultimately to have the "money repaid to me." One method of doing that was indicated by the Court of Appeal in the case which has been cited to us of *Fraser & Haws, Ld.* v. *Burns.* (1) The Court of Appeal there said that the money paid into court should remain in court till the trial of the action. But if in such a case as this it is admitted that the amendment of the pleadings raises an insuperable obstacle to any possible success by the plaintiff, I think there must be inherent power in the Court to order payment out of the money to the defendant, notwithstanding the fact that Order XXII., r. 3, does not in terms contemplate such a possibility. The result is that the order of the Court will be: Appeal allowed, and, the plaintiff by his counsel stating that the amendment of the defence is an insuperable bar to his claim, action dismissed. The defendant to have the costs of the summons under appeal and of this appeal. The plaintiff to have the costs of the action up to and including the amendment of the defence. The 100*l.* to be repaid by the plaintiff to the defendant.

GODDARD L.J. I agree. I only want to add this one word. I think it was unfortunate that the learned Judge was not informed of this payment into court on the application to amend the defence. There is no difficulty in informing a Judge in these circumstances of a payment into court. Order XXII., r. 6, says: "No communication of that fact"—that is, that the money has been paid into court—"shall at the trial "of any action be made to the Judge or jury until all questions

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(1) (1934) 49 Ll. L. Rep. 216.

"of liability and amount of debt or damages have been decided." If this sort of point should arise again, when an amendment of the pleadings is sought before trial—and the same question may arise because of payment of money into court—that is a matter which the learned Judge ought to know when he is being asked to allow an amendment of the pleadings. Obviously he can be told then; there is no prohibition in the rule against telling him, and it was unfortunate, I think, that the learned Judge was not told. It should be made clear, I think, that Order XXII., r. 6, does not prevent a Judge on an interlocutory application being informed of the fact of payment in, where it is desirable that he should know it.

DU PARCQ L.J. I agree: and I agree not only with what has been said by my Lord, but also with what has been said by Goddard L.J. It is a matter of some importance; because it would lead to injustice very often if it were thought that the Judge sitting in Chambers could not be told that money had been paid into court. I think there would have been no difficulty, if the whole of the facts had been stated to the learned Judge on the application to amend the defence, in the way of his making substantially the order we are making now. It would have meant that he would then have allowed the amendment and ordered that the notice should be withdrawn. Then it would have followed either that the money should be paid out to the defendant or, if the case had to go on, that it should remain in court. I agree with the order proposed by my Lord.

Solicitors for appellant: *Ballantyne, Clifford & Co.*
Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

W. L. L. B.

REX *v.* HARTLEY.

C. C. A.

1940
Nov. 4.

Criminal law—Evidence—Admissibility—Buggery—Charge of offence on specific date—Evidence of offence with same boy on previous occasion —Corroboration—Evidence relating to earlier occasion corroborated —Whether corroboration of evidence relating to date charged.

The appellant was convicted on a charge of committing buggery with H. on a certain date. H. gave evidence not only of the commission of the offence on the date charged, but also of the commission of an offence on an earlier occasion. There was no corroboration of H.'s evidence regarding the date charged, but there was corroboration of his evidence regarding the earlier occasion. The judge directed the jury that they might treat the evidence corroborative of H.'s evidence relating to the earlier occasion as corroborative of his evidence relating to the date charged:—

Held, (*a*) that the evidence of H. relating to the earlier occasion was rightly admitted; and (*b*) that the judge had correctly directed the jury on the question of corroboration.

Appeal against conviction and sentence.

The appellant, William Hartley, was convicted on July 12, 1940, before Oliver J. at Manchester Assizes, on an indictment which charged him with committing buggery on March 9, 1940, with C. E. H., aged ten years, and was sentenced to seven years' penal servitude.

At the trial C. E. H. gave evidence of the commission of an offence by the appellant not only on March 9 but also on a previous occasion. There was no corroboration of the evidence of C. E. H. regarding March 9, but there was corroboration of his evidence regarding the earlier occasion given by two independent witnesses who said that they saw the appellant go into an office with C. E. H. and two other boys, after which the door of the office was locked and the window blinds were pulled down.

Oliver J. directed the jury that the evidence of C. E. H. as to the earlier incident was admissible, and he continued: "The reason it is relevant to the charge is this. It is said "that this man had a guilty passion for this particular boy, "and, if he had, you would expect him to indulge it more "than once, and, therefore, if you can satisfactorily find it "proved that on another occasion he was indulging himself

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"with this boy, that will assist you to decide whether he did "the same thing on March 9." On the question of corroboration Oliver J. told the jury that they ought not to convict the appellant on the uncorroborated evidence of C. E. H., and he continued: "If you think that that boy" [one of the independent witnesses to the incident on the earlier occasion] "is telling the truth, you will have to ask yourselves whether "that is not corroborative evidence on which you can act."

Maurice Healy K.C. and *Seaton* for appellant. The conviction should be quashed. The judge was wrong in holding that C. E. H.'s evidence of the earlier incident was admissible. *Reg.* v. *Rearden* (1) is distinguishable from the present case because there the acts of which evidence was given and which were committed after the act which formed the subject-matter of the charge were all part of one and the same transaction, whereas here it cannot be suggested that what occurred on March 9 and what occurred on the previous occasion constituted one transaction. Oliver J. misdirected the jury when he told them that the evidence of C. E. H. relating to March 9 could be corroborated by evidence which was corroborative of his evidence relating to the earlier occasion.

R. H. Blundell, for the Crown, was not called on to argue.

The judgment of the Court (LORD CALDECOTE C.J., HAWKE and HUMPHREYS JJ.) was delivered by

HUMPHREYS J., who stated the facts, and continued: It has been argued that Oliver J. admitted evidence which was inadmissible and that he misdirected the jury on the question of corroboration. In the opinion of the Court he did not err in either of those ways.

The contention that the evidence of C. E. H. regarding the earlier occasion was inadmissible was abandoned in the course of the argument, and rightly abandoned, because, where a person alleges that an offence such as that with which we are concerned here has been committed against him and that the occasion was not an isolated one, he is entitled to give evidence

(1) (1864) 4 F. & F. 76.

that the offence was indulged in habitually. *Reg.* v. *Rearden* (1) does not throw any doubt on this proposition, but rather supports it.

With regard to the allegation of misdirection, it must be remembered that what is required in the nature of corroboration is not "independent evidence of that which the accomplice "relates, or his testimony would be unnecessary . . . . What "is required is some additional evidence rendering it probable "that the story of the accomplice is true and that it is "reasonably safe to act upon it": *Rex* v. *Baskerville*, per Lord Reading C.J. (2) The only question for our decision, therefore, is whether the evidence of the two independent witnesses rendered it probable that the story told by C. E. H. was true. In our opinion, the evidence of those witnesses was clearly evidence which the jury were entitled to say strengthened the evidence of C. E. H. It is a little difficult to understand how there can be any doubt whether a jury, on a charge of indecent behaviour with a small boy, may regard as corroboration of evidence supporting the charge the proof by independent evidence that the accused person was, on an occasion other than that charged, with the boy in a locked room with the blinds down. In our view, the summing-up was correct and there is no ground for interfering with the conviction or the sentence.

Appeal dismissed.

Solicitors for appellant: *Philip Conway, Thomas & Co.*
Solicitor for Crown: *Director of Public Prosecutions.*

(1) 4 F. & F. 76.

(2) [1916] 2 K. B. 658, 664, 665.

G. F. L. B.

1940
Oct. 15.

THE KING *v.* BRITTON AND OTHERS (LICENSING JUSTICES FOR THE CITY OF HEREFORD).

Ex parte NEWTON.

Licensing—Public dancing—Power to grant licence for use on Sundays—Removal of restrictions in original licence—Sunday Observance Act, 1780 (21 *Geo.* 3, *c.* 49), *s.* 1—*Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 51—*Sunday Entertainments Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 51), *ss.* 3, 4, 5.

Licensing justices have no power under the Public Health Acts Amendment Act, 1890, to grant a licence for public dancing on Sundays, and therefore they have no power to remove a restriction contained in the original licence so as to permit public dancing on Sundays.

APPLICATION for an order of certiorari to quash an amendment to a music and dancing licence granted by the Hereford City Justices. The application was made on behalf of Freeman Newton, chief officer of police for the city of Hereford.

Sect. 51 of the Public Health Acts Amendment Act, 1890, had been adopted and was in force in the city of Hereford.

On February 13, 1940, the Rev. Cyril Wilfred de Normanville, O.S.B., was granted a licence by way of renewal under the Act of 1890 to use the building known as St. Francis Xavier's Club Room for the term of one year for music and dancing. The licence was granted subject to certain terms, conditions and restrictions attached thereto, one of which was that " The building aforesaid shall not be opened under " this licence on Sundays, Good Friday and Christmas Day " and shall be closed not later than eleven o'clock at night " except for a dance or ball."

On July 22, 1940, the Rev. C. W. de Normanville was charged at the city petty sessional court, and convicted and fined, for a blackout offence in respect of the hall, and for using the hall on Sundays contrary to the terms of the licence.

After the conviction the Rev. C. W. de Normanville announced to the justices in open court that he would make application for an amendment of the licence, or for leave to hold dances on Sundays. He was told by the chairman to make application at the next court which would be held on July 25, 1940.

The notice that was sent to the chief of police by the clerk to the justices on July 24, 1940, was "that a special session of "justices of the peace for this city will be held at the Petty "Sessional Court House, Gaol Street, in the said city, on "Thursday next, the 25th inst., at 10.30 A.M., to consider an "application by Father Cyril Wilfred de Normanville that "the restriction on public dancing on Sundays attached to "the licence for dancing at the St. Francis Xavier's Club "Room, Victoria Street, be rescinded."

On July 25 application for an amendment of the licence was made and the application was granted despite protests by the police both on legal grounds and on grounds of nuisance.

When the chairman of the justices informed the applicant that the justices by a majority had decided to grant his application, Inspector Wheatley on behalf of the police again objected to the justices' decision as being ultra vires, and he then drew the attention of the justices to the Sunday Entertainments Act, 1932, which he maintained provided that licences could not be granted for Sunday dancing.

The chairman of the justices in his affidavit in reply to the motion said: "The justices respectfully submit that the Sunday "Entertainments Act, 1932, does not prevent them granting the "application and that although the variation includes permission to hold dances as well as other entertainments, the "dances in question might reasonably be considered to be "'musical entertainments' within the meaning of the said Act."

On August 27, 1940, the Divisional Court gave leave to move for an order of certiorari to remove into the High Court the amendment to the licence. The notice was served upon the Rev. Cyril Wilfred de Normanville as respondent.

The grounds on which the notice was given were as follows:

1. That the justices had no power to grant a licence in respect of public dancing on Sundays.

2. That the justices had no power to remove or modify a restriction contained in the licence during the currency thereof.

3. That the justices had no power during the currency of

1940 Rex v. Britton. Newton, *Ex parte.*

the licence to permit the building to be opened for the purposes named in the licence except on the days stated therein.

4. That no notice of the application was given by the licensee to the chief officer of police of the police district in which the building was situated as required by s. 51, sub-s. 4, of the Public Health Acts Amendment Act, 1890.

5. That 14 days' notice of the application was not given by the licensee to the clerk of the licensing justices as required by the sub-section.

6. That the session of the justices was not a special sessions convened with 14 days' previous notice required by s. 51, sub-s. 2, of the Act.

7. That in granting the application the justices exceeded their jurisdiction.

W. E. P. Done for the applicant. The licensing justices had no power to grant a licence for dancing on Sundays. Under the Sunday Observance Act, 1780, the use of any house, room or other place, to which persons are admitted on payment of money, for public dancing on Sundays is illegal. The London County Council adopted the procedure of undertaking not to prosecute cinematographs if they opened on Sundays provided they paid a certain sum to charities. This procedure was held in *Rex* v. *London County Council* (1) to be illegal. The Sunday Entertainments Act, 1932, was passed to get over this difficulty, but that Act only excepts from the operation of the Act of 1780 cinematographs and musical entertainments. Sect. 3 of the Act of 1932 gives power to grant "licences in "respect only of musical entertainments on Sundays." "Musical "entertainments" are defined in s. 5 as meaning "a concert "or similar entertainment consisting of the performance of "music with or without singing or recitation." In the city of Hereford the powers of the licensing justices are controlled by s. 51 of the Public Health Acts Amendment Act, 1890, as modified by s. 3 of the Act of 1932. It is admitted that but for the Act of 1932 the licensing justices might grant a licence for public dancing on Sundays when such public dancing was held gratuitously. In the present case a charge of 6*d.* was made for dancing on Sundays. That brought this case within the decision in *Rex* v. *London County Council.* (1) The licensing justices according to the chairman's affidavit held that public dancing was a form of musical entertainment, but the reason given in the notice for the special sessions was that "the restriction on public dancing on Sundays attached "to the licence for dancing at the St. Francis Xavier's Club "Room, Victoria Street, be rescinded." The definition of "musical entertainment" in s. 5 of the Act of 1932, does not include public dancing. The licensing justices had only power under the Act of 1932 to grant licences for a musical entertainment on Sundays and therefore had no power to grant a licence for dancing on Sundays. The powers of the licensing justices under s. 51 of the Act of 1890 must be considered for the purposes of that section as modified by s. 3 of the Act of 1932. Sect. 51 of the Act of 1890 must be read as if s. 3 of the Act of 1932 were set out in it. The result would be that in order to give effect to the word "only" in s. 3 of the Act of 1932, the powers of the licensing justices under s. 51 of the Act of 1890 do not include a power to grant a licence for dancing on Sundays. The effect of s. 3 of the Act of 1932 as read with s. 51 of the Act of 1890 is to exclude the power of the licensing justices to grant a licence for dancing on Sundays.

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(1) [1931] 2 K. B. 215.

The licensing justices had no power to vary a licence for dancing during its existence by removing restrictions without giving notice for a new licence. The licensing justices have no power to alter the days during which a hall is open under a licence for dancing during the existence of the licence.

Neither the respondent, the Rev. C. W. de Normanville, nor the licensing justices appeared to oppose the application for an order of certiorari to quash the amendment to the licence.

Lord Caldecote C.J. This is an application by the chief officer of police for the city of Hereford for an order of certiorari to remove into this Court, for the purpose of being quashed, an amendment to a licence dated February 13, 1940, granted to the Rev. C. W. de Normanville, authorizing the use of a building in the city of Hereford for the purpose of public dancing, singing, music or other public entertainments of the like kind, subject to the directions, conditions and restrictions contained therein. The licence contained a restriction on the use of this building in these terms: "The "building aforesaid shall not be opened under this licence on "Sundays, Good Friday and Christmas Day."

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(1) [1931] 2 K. B. 215.

In consequence of certain proceedings against Mr. de Normanville for having used the building in breach of that restriction, an application was made by him to the justices for a variation of the existing licence by removing the restriction on the use of the building for public dancing on Sundays. When the application for the removal of the restriction came before the justices, the chief constable was not present and he was not represented, but the application was opposed on behalf of the police by Chief Inspector Wheatley. There seems to have been some doubt as to what precisely were the grounds of opposition to the application and perhaps the real nature of the opposition only developed during the course of the proceedings, but at some point, possibly after the justices had announced their decision, or the decision that they were prepared to give, the chief inspector took the point that there was no power to grant a licence for public dancing on Sundays.

The chairman of the justices has sworn an affidavit which has been filed setting out at length the reasons which actuated the bench in granting the amendment which was asked for. In the course of the affidavit which he has sworn it appears that the justices were influenced by the view that public dancing could be allowed as a "musical entertainment" under the Sunday Entertainments Act, 1932, but the point which we have to decide is whether there was any power to grant a licence for public dancing on Sundays. Whether any breach of the licence took place or whether the entertainment which took place on a Sunday evening was a musical entertainment or public dancing is not before us. The sole question is whether there was power to grant a licence for public dancing on Sundays.

The material legislation we have to consider begins with the Sunday Observance Act, 1780, of which s. 1 is as follows: "From and after the passing of this present Act, any house, "room or other place, which shall be opened or used for public "entertainment or amusement, or for publicly debating on any "subject whatsoever, upon any part of the Lord's Day called "Sunday, and to which persons shall be admitted by the "payment of money, or by tickets sold for money, shall be "deemed a disorderly house or place." That has the effect of making it illegal to grant a licence for public dancing on Sunday. The Sunday Entertainments Act, 1932, which was passed as a result of certain litigation in which the London County Council was concerned, contained a section with regard to musical entertainment. I only mention that because Mr. Done has read the section in connection with this point which I have mentioned as to musical entertainments on Sundays, but there is no power contained in that Act, which, according to its title, permits and regulates "the opening and "use of places on Sundays for certain entertainments," to grant a licence for public dancing on Sundays.

In those circumstances, it seems to me that there is no answer to the point which has been made by Mr. Done that the justices in this case had no power to remove the restriction contained in the original licence, because they had no power to grant a licence for public dancing on Sundays. The point is a short one. It depends upon a consideration of the legislation which I have mentioned. If there was no power in the justices to grant a licence for public dancing on Sundays, it is clear that they had no power to remove the restriction which was contained in the original licence so as to permit public dancing on Sundays. I am clearly of opinion that there was no power to do either of these things.

In those circumstances, there is no necessity to go into the other grounds upon which learned counsel for the applicant relied in support of his argument for the order of certiorari. The first ground is a good one and, in my judgment, an order of certiorari must be made for quashing the order which the justices made.

HAWKE J. I agree.

HUMPHREYS J. I also agree. I only desire to add one or two words. The application for a licence in this case was made in the terms of the Public Health Acts Amendment Act, 1890, s. 51. It may well be that that Act was read by the justices as enabling them to grant a licence to any person whom they may think fit to keep a house for the purpose. amongst other things, of public dancing, singing, music or other public entertainment of the like kind ; but, when that Act of Parliament was passed, there was in existence and still remains in existence the Sunday Observance Act of 1780, which expressly prohibited then and prohibits now any such thing as public dancing upon Sunday in premises kept or used for that purpose to which persons are admitted on payment of money. Therefore, in my judgment, s. 51 of the Act of 1890, which must be read with the old Act, never gave any power and never purported to give any power to licensing justices to grant a licence for public dancing on Sunday. The justices, that point being made before them, were referred to the Sunday Entertainments Act, 1932. It is quite true to say that, with regard to certain matters which were prohibited by the Act of 1780, power was given to the justices by the Act of 1932 to grant licences for certain purposes which otherwise they could not have granted and for the use of buildings for such purposes upon Sundays, but public dancing is not one of those purposes. It is true that one of the purposes is musical entertainment which may be given, but that, in my judgment, can afford no authority for granting a licence for public dancing on Sundays, which remains as much prohibited as it always has been.

Order for certiorari quashing amendment to licence.
Order for costs against respondent, Rev. C. W. de Normanville.

Solicitors for applicant: *Sharpe, Pritchard & Co., for T. B. Feltham, Town Clerk, Hereford.*

R. F. S.

ASSOCIATED BRITISH ENGINEERING, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1940
Oct. 7.

Revenue — Stamps — Company — Distribution of capital bonus — Shares in other companies—Transfer—" Voluntary disposition inter " vivos " — Ad valorem duty — Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8). *s.* 74, *sub-s.* 1—*Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *First Schedule.*

Where, in accordance with its memorandum of association and pursuant to a resolution passed in general meeting, a company distributed to its ordinary shareholders out of its capital reserve, and by way of capital bonus, a number of the fully paid shares and stock units which it held respectively in two other companies, each of the transfers to the various holders of the ordinary shares of the company was a transfer operating as a " voluntary disposition inter vivos " and liable to ad valorem duty under the provisions of s. 74 of the Finance (1909–10) Act, 1910, by reference to the value of the shares transferred in each case.

Case stated pursuant to the Stamp Act, 1891, s. 13.

The appellant company, Associated British Engineering, Ld., was incorporated on July 7, 1910, under the Companies (Consolidation) Act, 1908, under its former name of Petters, Ld., to carry on (inter alia) the business of manufacturers and engineers, with a capital of 150,000*l.*, which had since been increased to 500,000*l.*, divided into 250,000 preference and 250,000 ordinary shares of 1*l.* each. Of those, 236,447 preference shares and 152,500 ordinary shares had been issued, fully paid. Under clause 3 (*g*) of its memorandum of association the company had power " to distribute among the " members in specie any property of the Company or any " proceeds of sale or disposal of any property of the Company, " but so that no distribution amounting to a reduction of " capital be made, except with the sanction, if any, for the " time being required by law." It appeared from the balance sheet of the company of March 31, 1939, that in conjunction with the balance at credit of the profit and loss account carried forward at that date, namely, 16,639*l.* 0*s.* 6*d.*, the company was possessed of capital and revenue reserves aggregating 304,557*l.*, that was, approximately 2*l.* per ordinary share.

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In the report of the company, dated November 1, 1939, for the year ended March 31, 1939, it was recommended by the directors that in accordance with clause 3 (*g*) of the memorandum of association a portion of the capital reserves, being surplus proceeds of sale of certain of the company's property, be distributed by way of capital bonus to the ordinary shareholders, partly in specie and partly in cash, and they recommended further that a distribution equivalent in value to approximately 1*l.* per share be made to each ordinary shareholder in respect of each ordinary share registered in his name on November 15, 1939. In furtherance of that recommendation the following resolution was passed at the annual general meeting of the company held on November 15, 1939: "That in accordance with Clause 3 (*g*) of the Memorandum "of Association, a portion of the Capital Reserve, now standing "at the figure of 287,918*l.* 12*s.* 7*d.*, the whole of which sum "represents surpluses arising from the sale of portions of the "Company's property, be distributed by way of capital Bonus "to the ordinary shareholders, and that accordingly there be "distributed out of the said Capital Reserve to each ordinary "shareholder in respect of each ordinary share registered in "his name at 4 P.M. on November 15, 1939, one fully paid 5*s.* "ordinary share in Heenan & Froude, Limited, one 5*s.* ordinary "stock unit in the Brush Electrical Engineering Company, "Limited, and seven shillings and sixpence in cash, save that "holders of twenty shares or fewer shall receive in lieu of the "above distribution the sum of one pound entirely in cash in "respect of each ordinary share so registered in their names."

The opinion of the Court was desired as to the stamp duty chargeable on the instruments of transfer of the ordinary stock units of the Brush Engineering Co., Ld., and of ordinary shares of Heenan & Froude, Ld., made by the appellant company to various transferees in accordance with the above resolution. The transfers were all in the same common form.

The Commissioners were of opinion that each of the transfers was a "conveyance or transfer operating as a voluntary "disposition inter vivos," liable to ad valorem duty under the provisions of s. 74 of the Finance (1909–10) Act, 1910 (1), by reference to the value of the shares transferred in each case. They accordingly assessed the transfers with the several ad valorem duties shown in the schedule, under the relevant statutory provisions.

The appellant company contended that each of the transfers was liable, not to ad valorem " voluntary disposition " duty, but to the fixed duty of 10*s.* under the head of charge "Conveyance or transfer of any kind not hereinbefore described" in the First Schedule to the Stamp Act, 1891. Accordingly, being dissatisfied with the assessments made, and having paid the duty in accordance with those assessments, the company, in pursuance of s. 13 of the Stamp Act, 1891, had required the Commissioners to state a case. The questions for the opinion of the Court were: (1.) Whether the transfers were liable to the several ad valorem duties assessed by the Commissioners; (2.) if not, with what duty were they chargeable?

E. M. Winterbotham (for *Herbert Hart*, on war service) for the appellant company.

Sir William Jowitt S.-G. and *J. H. Stamp* for the Crown.

In the course of the arguments, which are set out in the judgment, the following were referred to: *Jopling* v. *Inland Revenue Commissioners* (2); Buckley on The Companies Acts, 11th ed., p. 752; *In re Severn and Wye and Severn Bridge Ry. Co.* (3); Alpe on the Law of Stamp Duties, 22nd ed., p. 134; Key and Elphinstone's Precedents in Conveyancing, 12th ed., vol. I., pt. 2, p. 834; Prideaux's Precedents in Conveyancing, 23rd ed., vol. III., pp. 586, 766;

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(1) Finance (1909–10) Act, 1910, s. 74, sub-s. 1: " Any conveyance " or transfer operating as a voluntary disposition inter vivos shall " be chargeable with the like " stamp duty as if it were a conveyance or transfer on sale, with " the substitution in each case of " the value of the property conveyed or transferred for the " amount or value of the consideration for the sale. . . . ."

Sub-s. 6: " A conveyance . . . . " under which no beneficial interest " passes in the property conveyed " or transferred . . . . shall not be " charged with duty under this " section."

(2) [1940] 2 K. B. 282.

(3) [1896] 1 Ch. 559.

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ASSOCIATED BRITISH ENGINEERING, LD. *v.* INLAND REVENUE COMMISSIONERS.

Fleetwood-Hesketh v. *Inland Revenue Commissioners* (1); and *Cohen and Moore* v. *Inland Revenue Commissioners.* (2)

LAWRENCE J. The question in this appeal is whether certain transfers of shares in other companies from the appellant company to its shareholders, which were made in pursuance of a resolution declaring a capital bonus of the appellant company partly in specie and partly in cash, are stampable under s. 74, sub-s. 1, of the Finance (1909–10) Act, 1910, as being conveyances or transfers operating as voluntary dispositions inter vivos. The appellant company passed a resolution authorizing the distribution of fully paid shares in Heenan & Froude, Ld., and stock units in the Brush Electrical Engineering Co., Ld., and some cash. The resolution, in pursuance of the recommendation of the Directors, was passed on November 15, 1939, authorizing this distribution of the capital bonus, and the transfers in question were made in pursuance of that resolution.

It is argued on behalf of the appellants that these transfers did not operate as voluntary dispositions inter vivos, and the main dispute between the appellants and the Crown is whether it is right to look at the whole transaction, that is to say, the transfers and the antecedent resolution declaring the capital bonus, or whether it is right to look solely at the transfers themselves. It is argued that on the passing of the resolution an equitable right to the shares to which the resolution referred was created in the shareholders of the appellant company, that therefore the transfers themselves did nothing more than give effect to the pre-existing right of the shareholders, and did not pass any beneficial interest to the shareholders themselves, and that, apart from that consideration, which has reference to sub-s. 6 of s. 74, it cannot in any event be said that the transfers were voluntary, because they were made in pursuance of the obligation which the company had already undertaken.

The Solicitor-General, on the other hand, argues that the transaction must be looked at in reality, and as a whole, and that, if it is looked at in that way, it is impossible to dissociate the transfers from the resolution declaring the capital bonus, and that if it is so looked at the transaction is truly described as a voluntary disposition inter vivos, because it was a disposition by the company which the company chose to make. To that argument Mr. Winterbotham, in reply, contended that if it was right to go back in that way to the resolution of the company, it still could not be said that it was a voluntary disposition, because it was a disposition made by the company in pursuance of the will legally expressed by the corporators or shareholders in the company.

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(1) [1936] 1 K. B. 351.

(2) [1933] 2 K. B. 126.

The question turns upon the meaning of the words "voluntary "disposition inter vivos" in s. 74, sub-s. 1, and particularly upon the meaning of the words in sub-s. 6: "A conveyance ". . . . under which no beneficial interest passes in the "property conveyed or transferred," a sub-section providing that such a conveyance shall not be charged with duty under the section. As I have already said, the appellants' argument is that no beneficial interest passed in the property conveyed or transferred in this case, because, so it is contended, the beneficial interest had already passed by virtue of the resolution of the company.

I am unable to accept the arguments that were put forward on behalf of the appellants. In my opinion, the transactions ought to be regarded as a whole, and if that is the true view, it appears to me that the disposition was a voluntary disposition by the company of its reserves, and I do not think that it can successfully be argued that the company was not acting voluntarily because it was acting in pursuance of the wishes of the majority of the corporators legally expressed, nor do I think that it can truly be said that no beneficial interest passed in the property conveyed by virtue of those transactions. As I understand the facts, the company held a larger number of shares in these companies than they actually disposed of to their shareholders, and although the resolution no doubt gave to the shareholders in the appellant company a right of action in respect of the declaration of this capital bonus, it did not create any trust, and in my opinion, on the

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execution of these transfers a beneficial interest did pass in the property conveyed to the shareholders.

For both these reasons, therefore, I am of opinion that the decision of the Commissioners was right and that this appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for appellants : *Pennington & Son.*
Solicitor for the Crown : *Solicitor of Inland Revenue.*

CH. C.

CAINE *v.* HINCKES.

1940
Oct. 11.

Practice—Costs—Case by consent ordered to be tried before special referee—No order by special referee allowing costs on High Court scale—"Action"—"Matter"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 89 (*a*)—*County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 47, *sub-s.* 3.

Where an action has by consent of the parties under s. 89 (*a*) of the Judicature Act, 1925, been ordered to be tried before a special referee, s. 47, sub-s. 3, of the County Courts Act, 1934, which deals with the costs thereof, is applicable, the word "referee" therein including a special referee, and the word "matter" including such a reference.

Therefore, where the special referee on such a reference awards that the plaintiff shall recover a sum less than 100*l.* and does not make an order that the costs shall be on the High Court scale, they are to be taxed on the appropriate county court scale.

Street v. *Street* [1900] 2 Q. B. 57 distinguished.

APPLICATION to Asquith J. in Chambers for an order to review a taxing master's certificate under Order LXV., r. 27, reg. 41. (1)

The action, which was on a building contract, was commenced in the High Court through the Wolverhampton district registry by a writ dated June 7, 1939, in which the plaintiff claimed 136*l.* 3*s.* 2*d.* By an order dated August 18, 1939, made by consent of the parties under sec. 89 (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925 (2), the action (together with an immaterial counterclaim) was ordered to be tried by a special referee. On August 23, 1939, the special referee awarded that the plaintiff was entitled to recover 70*l*. 16*s*. 4*d*. on the claim, and the defendant was entitled to recover 8*l*. 10*s*. on the counterclaim. He also ordered that the defendant should pay the plaintiff's costs (to be taxed) on the claim, reference and award, and that the plaintiff should pay the defendant's costs (to be taxed) on the counterclaim, reference and award. The award did not specify whether such costs should be on the High Court scale or on any, and if so which, of the county court scales. (1)

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(1) Reported at the request of the learned Judge.

(2) Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 89: "In any cause or matter, other "than a criminal proceeding by "the Crown,—(*a*) If all the parties "interested who are not under "disability consent; or (*b*) If the "cause or matter requires any "prolonged examination of docu-"ments or any scientific or local "investigation which cannot in "the opinion of the Court or a "Judge conveniently be made "before a jury or conducted by "the Court through its other "ordinary officers; or (*c*) If the "question in dispute consists "wholly or in part of matters of "account; the Court or a Judge "may at any time order the whole "cause or matter, or any question "or issue of fact arising therein "to be tried before a special "referee or arbitrator respectively "agreed on by the parties, or "before an official referee or officer "of the Court."

The district registrar in taxing the costs decided that the costs of the action, exclusive of those of the reference to the special referee, should be on county court scale C, but that the costs of the action as far as regarded the reference should be on the High Court scale. It was against the latter part of the registrar's decision that the defendant appealed.

C. L. Henderson for the applicant.
Jellinek for the respondent.

ASQUITH J. This is an application by the defendant under Order LXV., r. 27, reg. 41, for a review of taxation, the Wolverhampton district registrar in taxing a bill of costs

(1) By the County Courts Act, 1934 (24 & 25 Geo. 5, c. 53), s. 47, sub-s. 1: "Where an action is "commenced in the High Court "which could have been com- "menced in a county court, then, "subject to the provisions of "sub-s. (3.) . . . . of this section ". . . . (*b*) if the plaintiff re- "covers (i.) in the case of an action "founded on contract, a sum of "forty pounds or upwards but "less than one hundred pounds ". . . . he shall not be entitled "to any more costs of the action "than those to which he would "have been entitled if the action "had been brought in a county "court."

Sub-sect. 3: "In any such "action as aforesaid, whether "founded on contract or tort, the "High Court or a judge thereof "(or where the matter is tried "before a referee or officer of the "Supreme Court, that referee or "officer), if satisfied (*a*)—that "there was sufficient reason for "bringing the action in the "High Court . . . . may make an "order allowing the costs or any "part of the costs thereof on the "High Court scale or on such one "of the county court scales and "under such one of the columns "in the scale as he may direct."

having overruled objections on the part of the defendant. [The learned Judge stated the facts as above set out and proceeded:] The defendant took objection to the decision as to the costs of the reference on the ground that the plaintiff was not entitled to High Court costs in a case of contract where under 100*l.* was recovered unless the special referee were satisfied that there was sufficient reason for bringing the action in the High Court and expressly made an order allowing the costs on the High Court scale: and that as he had made no such order the costs of the plaintiff including those of the reference should not be allowed on the High Court scale but on county court scale C.

This objection assumed that s. 47, sub-s. 3, of the County Courts Act, 1934, applied to that part of the bill of costs which related to the costs of the reference as well as to that part which related to the costs of the action exclusive of the reference. The district registrar in disallowing the objection explained that in his view the sub-section did not apply to the costs of the reference but only to the costs of the action exclusive of the reference.

Sect. 47 so far as material reads as follows:—[The learned Judge read the section].

Now it seems clear that the expression " referee or officer " of the Supreme Court " in the words bracketed in sub-s. 3, include a special referee: for even if " referee " did not include special referee, s. 90, sub-s. 1, of the Act of 1925 (omitting immaterial words) provides that " In all cases of reference to " a . . . . special referee . . . . the . . . . special referee . . . . " shall be deemed to be an officer of the Court."

If so the question reduces itself to this: does the word " matter " in s. 47, sub-s. 3, of the Act of 1934 in the phrase " or where the matter is tried before a referee or officer of the " Supreme Court " cover what was referred to the special referee in the present case?

In this sub-section it seems to me that " action " means the totality of the proceedings, the costs of which have to be dealt with: and the " matter " means that part of the action which is referred: and that at all events where (as here) all

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Asquith J.

the issues are referred to him, a special referee has the same functions, in relation to the costs of the totality of the proceedings (including the reference), as a Judge would have in regard to the costs of the totality of the proceedings if there were no reference. If in a case of contract a sum between 40*l.* and 100*l.* is awarded by him, the costs of the whole proceedings including the reference must be on the appropriate county court scale unless he is satisfied there was good cause for bringing the proceedings in the High Court *and* makes a special order for High Court costs. He has not made such a special order in this case and it follows that costs must be on the appropriate county court scale, scale C.

On this short ground I hold that the registrar was mistaken in thinking that s. 47, sub-s. 3, of the County Courts Act, 1934, does not apply to the costs of this reference, and, the special referee not having ordered that the costs of the reference were to be on the High Court scale, they should have been taxed on the appropriate county court scale, namely scale C.

In order to avoid this result the respondent had to argue that the words in sub-s. 3 were meaningless, or alternatively that by implication they only applied to references in invitum under s. 89 (*b*) and (*c*) of the Act of 1925, not to references by consent under s. 89 (*a*). I cannot see why such a limitation should be implied. Further argument was based on cases such as *Street* v. *Street.* (1) These cases, however, were decided under the County Courts Act, 1867 (30 & 31 Vict. c. 142), the material provisions of which are differently worded from those of the Act of 1939; and in any case the reference in those cases expressly conferred an unfettered discretion on the arbitrator or referee as to costs. Further, reliance was placed on the Arbitration Act, 1889 (52 & 53 Vict. c. 49), Sch. I. (i.), which enacts that among the provisions implied in submissions to arbitration unless the submission contains something to the contrary shall be a provision that the costs of the reference or award shall be in the discretion of the arbitrators or umpire. This argument assumes that an order of the Court by consent under s. 89 (*a*) of the Act of 1925 is

(1) [1900] 2 Q. B. 57.

a submission to arbitration, which in my view it is not. The definition of a submission in s. 27 of the Act of 1889 does not cover such an order.

In the result the review of taxation asked for must be granted and an order made that the costs of the reference should be taxed on the county court scale applicable and that the defendant shall have the costs of the proceedings in Judge's chambers and of the proceedings (if there was a hearing) before the district registrar.

Solicitors for applicant: *Maude & Tunnicliffe, for Stirk & Co., Wolverhampton.*

Solicitors for respondent: *Wainwright & Co., for Feibusch & Wells, Wolverhampton.*

W. L. L. B.

1940
Oct. 30.

KITE *v.* BROWN.

Emergency legislation—Food control—Rationing—Supply of rationed food for household consumption, not in accordance with the Rationing Order, 1939*—Customer not registered with supplier—Customer without a coupon—One offence or two—Information charging supply of two rationed foods—Not bad for duplicity—Rationing Order,* 1939 (*St. R. & O.* 1939, *No.* 1856), *regs.* 2, 7.

The appellant, a retailer, was charged under the Rationing Order, 1939, with unlawfully supplying rationed food, to wit, half a pound of butter to B. H. for household consumption, she being the holder of a general ration book and not being registered with the appellant. By a separate information he was charged with unlawfully supplying rationed food, to wit, half a pound of butter to B. H. for household consumption, without a coupon. Both informations related to the same supply of butter at the same time. The appellant was convicted and fined on each information.

The appellant was charged on two further informations under the Order with unlawfully supplying rationed food, to wit, half a pound of butter and half a pound of bacon to D. M. T. for household consumption, she being the holder of a general ration book and not being registered with the appellant, and also with supplying the same articles to D. M. T. for household consumption without a coupon. The information related to butter and bacon supplied to D. M. T. at the same time :—

Held, that each of the two first-mentioned informations disclosed a separate offence and that the two further informations were not bad for duplicity.

CASE stated by justices for the borough of Gravesend.

At a petty sessions for the borough on March 15, 1940, six informations were preferred by the respondent, Henry Hampton Brown, chief food officer of the borough of Gravesend, against Albert Edward Kite, the appellant, under reg. 55 of the Defence (General) Regulations, 1939; art. 2 of the Rationing Order, 1939; and the Emergency Powers (Defence) Act, 1939; charging that the appellant on February 2, 1940, did unlawfully supply rationed food, to wit :—

(I.) Half a pound of butter to Beatrice Hammond for household consumption, she being the holder of a general ration book and not being registered with the appellant ;

Reported by C. G. Moran, Esq., Barrister-at-Law.

(2.) Half a pound of butter to Beatrice Hammond for household consumption, without a coupon;

(3.) Half a pound of bacon to Helen Gosling for household consumption, she being the holder of a general ration book and not being registered with the appellant;

(4.) Half a pound of bacon to Helen Gosling for household consumption, without a coupon;

(5.) Half a pound of butter and half a pound of bacon to Dorothy Marion Tyrrell for household consumption, she being the holder of a general ration book and not being registered with the appellant;

(6.) Half a pound of butter and half a pound of bacon to Dorothy Marion Tyrrell for household consumption, without a coupon.

The appellant was convicted before the justices of all the offences and they adjudged him to pay on each of the six informations a fine of 2*l.* 10*s.* and 2*l.* 10*s.* 8*d.* costs.

At the hearing the following facts were proved:—

On February 2, 1940, Beatrice Hammond purchased at the appellant's shop one half pound of butter. She was the holder of a general ration book and was not registered with the appellant. Neither the relative leaf of her ration book nor the relative part of the leaf was for the time being deposited with the appellant in the prescribed manner. She did not at the time of the purchase produce to the appellant's servant her ration book, and the appropriate coupon or coupons representing the amount of food obtained were not detached by the appellant's servant.

Exactly similar facts were proved as to the purchase by Helen Gosling on February 2, 1940, at the appellant's shop of one half pound of bacon.

Exactly similar facts were proved as to the purchase by Dorothy Marion Tyrrell on February 2, 1940, at the appellant's shop of one half pound of butter and one half pound of bacon, except that in this case it was charged that the purchase was from the appellant himself and that the purchaser did not at the time of the purchase produce to the appellant her ration book and the appropriate coupon or coupons

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representing the amount of food obtained were not detached by the appellant.

It was contended for the appellant that these facts disclosed at the most only three or substantially three offences by the appellant, and that there should not be convictions on all six of the informations, but at the most on three thereof.

It was contended for the respondent that the facts disclosed six separate offences by the appellant and that there should be separate convictions on all six of the informations.

The justices were of opinion that the facts disclosed six separate offences by the appellant and they registered a separate conviction on each of the six informations.

The questions of law arising for the opinion of the Court were :—

(1.) Whether the facts disclosed six or three or substantially three offences by the appellant and whether the justices were right in registering separate convictions and imposing separate penalties in respect of each of the six informations ; and

(2.) Whether the fifth and sixth informations were not bad for duplicity and ought not to have been dismissed on that ground.

Collard for the appellant. The offence committed by the appellant, a retailer, in the case of each woman, was the supply to her of rationed food for household consumption not under the authority of the Minister or in accordance with the provisions of the Rationing Order, 1939 : see reg. 2 of that Order. (1) The fact that, on breach of reg. 2, the

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(1) By reg. 2 of the Rationing Order, 1939, made under reg. 55 of the Defence (General) Regulations, 1939, made under s. 1 of the Emergency Powers (Defence) Act, 1939 : " Except under the authority of the Minister " (the Minister of Food) " or under and in " accordance with the provisions " of this Order or any directions " or licence issued thereunder, a " person shall not . . . . supply " . . . . any rationed food for " household consumption . . . . "

By reg. 3 : " Until the Minister " otherwise prescribes the rationed " foods shall be :—(i.) Bacon. (ii.) " Butter. (iii.) Meat. (iv.) Sugar."

By reg. 7 : " Except where the " Minister shall otherwise authorise, no person may obtain any " rationed food for household consumption unless the following " conditions are complied with :— " (*a*) A person who is the holder of " a general . . . . ration book appellant failed to comply with more than one of the requirements of reg. 7 of the Order is immaterial. On the supply of one article, the single offence under reg. 2 cannot be split into a number of offences alleging that the person charged had failed to comply with different requirements of the Rationing Order. In *Rex* v. *Kenny* (1) the appellant pleaded guilty to one offence of pavilion-breaking and larceny and also to another of malicious damage, but the malicious damage was merely an incident to the breaking-in, yet the appellant was sentenced in respect of each offence "as though they "were distinct offences." The Court of Criminal Appeal quashed the conviction for malicious damage. So here, the facts that the customer in each case was not registered and had no coupon were merely incidental to the offence which was that of supplying rationed food for household consumption not in accordance with the Order, Accordingly, there were at most three and not six offences committed.

The second point that the fifth and sixth informations were bad for duplicity was not taken before the petty sessions, but it was inserted by the appellant in the draft case and accepted by the justices. Each of these informations charged the supply of a parcel of bacon and a parcel of butter to Dorothy Marion Tyrrell. These informations were bad for duplicity. *Rex* v. *Hammick. Ex parte Murdoch.* (2) In that case an information was laid against the applicant for unlawfully acquiring various articles of food, to wit: sugar, tea, flour, milk, tongues and other articles of food, so that the quantity in his possession at any one time exceeded the quantity ordinarily required for use and consumption in his household, contrary to the Food Hoarding Order, 1917.

"shall obtain rationed food only "from a retailer with whom he "shall be registered . . . . (*c*) The "appropriate coupon or coupons "representing the amount of food "obtained must be detached and "retained by the retailer . . . ."

By reg. 43: "Infringements of "this Order are offences against "the Defence (General) Regulations, 1939."

By reg. 92 of the Defence (General) Regulations, 1939: "If "any person contravenes or fails "to comply with any of these "Regulations, or any order, rule or "bye-law made under any of these "Regulations . . . . he shall be "guilty of an offence against that "Regulation. . . . ."

(1) (1929) 21 Cr. App. R. 78.

(2) [1918] W. N. 111.

Evidence was given in the respect of sugar and flour and the applicant was convicted. The Court held that a separate offence was committed in respect of each article of food hoarded and accordingly that the information was bad for duplicity.

[LORD CALDECOTE C.J. We do not want to hear you on the first point Mr. Gattie. What do you say on the second ?]

Vernon Gattie for the respondent. The charge alleged in the fifth and sixth informations is the supplying of rationed food for household consumption to a person who was the holder of a general ration book and was not registered with the appellant, and without a coupon. Rationed food includes any of the foods rationed, namely, bacon, butter, meat and sugar, which can be supplied at the same time to the same person. " Half a pound of butter and half a pound of bacon " is in this case merely a description of " rationed food." *Rex* v. *Hammick. Ex parte Murdoch* (1) dealt with the acquisition of food over a long period of time—from April to November. In November the information was laid, so that in that case the facts might be very different in the case of one commodity charged to those in the case of another commodity charged.

Collard replied.

LORD CALDECOTE C.J. This is an appeal by way of case stated by the justices for the borough of Gravesend with reference to charges on which the appellant was convicted under the Rationing Order, 1939. It is well known that the Order makes it an offence for a person to supply any rationed food for household consumption " except," as reg. 2 provides, " under the authority of the Minister or under and in accordance " with the provisions of this Order."

The appellant was charged under six informations with having on February 2, 1940, unlawfully supplied rationed food. Two points are taken upon these six informations and the convictions which followed them. The first two

(1) [1918] W. N. 111.

informations related to the supply to Beatrice Hammond. The first charge was that the rationed food, one half pound of butter for household consumption, was supplied to her "she being the holder of a general ration book "and not being registered with the appellant." There was another information charging the supply of rationed food, in this case also one half pound of butter—no doubt the same half pound of butter—to Beatrice Hammond, the same person "for household consumption, without a coupon." There were two similar charges relating to Helen Gosling.

Counsel for the appellant takes objection that the two informations were in respect of what he says was only one offence. For the purposes of his argument, he has referred us to the case of *Rex* v. *Kenny*. (1) There is not a very satisfactory report of that case, as, although the appeal was only against sentence, the decision of the Court, apparently, was to quash one of the convictions. The charge there was a double one, and the appellant pleaded guilty first to pavilion-breaking and larceny, and, secondly, to committing malicious damage. He was convicted of both offences and sentenced to two concurrent sentences, one of three years' penal servitude on the first charge and another of twelve months' imprisonment with hard labour on the second. Lord Hewart C.J., in giving the decision of the Court, said that the malicious damage was an incident of the breaking-in, but, nevertheless, the appellant had been sentenced in respect of each offence as though they were distinct offences. Thereupon he said that the conviction for malicious damage should be quashed, and the sentence for pavilion-breaking should be reduced from a sentence of penal servitude to one of twelve months' imprisonment with hard labour. I am unable to derive any assistance from that case, and the question possibly might arise, if it were necessary to look into it, whether it has been properly reported. (2)

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(1) (1929) 21 Cr. App. R. 78.

(2) By s. 4, sub-s. 3, of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23): "On an appeal against "sentence the Court of Criminal "Appeal shall, if they think that "a different sentence should have "been passed, quash the sentence "passed at the trial, and pass such "other sentence warranted in law

But in this case I have come to the conclusion that there were two offences, one possibly more serious than the other; and I am unable to see any difficulty in the course which was followed here, of charging the appellant with the offence, first of all, of supplying rationed food for household consumption to someone who was not registered with him, and, secondly, with supplying rationed food for household consumption to the same person without a coupon being delivered up. I think that the first objection is a bad one and fails.

With regard to the third pair of informations, namely, those relating to Dorothy Marion Tyrrell, one information was for supplying rationed food, to wit: "½ lb. butter and "½ lb. bacon to Dorothy Marion Tyrrell for household con"sumption, she being the holder of a general ration book "and not being registered with the appellant." There was another charge for supplying "½ lb. of bacon and ½ lb. of "butter" to her without a coupon. The objection is taken that those two informations were bad for duplicity. But as has been pointed out in the course of the argument, the offence under reg. 2 of the Rationing Order, 1929, alleged is that of having supplied "rationed food for household con"sumption" not "under and in accordance with the provisions "of" that Order. The particularization of the rationed food seems to me in no way to affect the information. It is quite true that half a pound of butter and half a pound of bacon are mentioned, and there might have been an offence charged by alleging the supply of half a pound of butter or half a pound of bacon. But the offence seems to me to be rightly charged here as the supply of rationed food. The fact that two different articles of rationed food were supplied at the

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"by the verdict (whether more or "less severe) in substitution there"for as they think ought to have "been passed, and in any other "case shall dismiss the appeal."

The note of the judgment in *Rex* v. *Kenny* (1929) 21 Cr. App. R. 78 in the Register of the Court of Criminal Appeal is:—

"Sentences quashed." Then follow the words "Quash con" with a line through them striking them out.

"Sentence of 12 months' H. L. "on charge of pavilion-breaking "substituted. No sentence for "wilful damage."

There appears, therefore, to be some evidence that a *lapsus linguæ* preceded any *lapsus calami*.

same time in no wise makes the information in question bad for duplicity. In my opinion, there is nothing in the second point, and the case to which we were referred, *Rex* v. *Hammick. Ex parte Murdoch* (1), under the very different language of the Food Hoarding Order, 1917, does not affect the opinion I have formed.

I have come to the conclusion, therefore, that all the convictions were legally and properly made, and in each case the conviction will stand. The appeal will be dismissed.

HAWKE J. I agree.

HUMPHREYS J. I agree.

Appeal dismissed.

Solicitors for appellant: *Thomas Church, Gravesend.*

Solicitors for respondent: *Watkins, Pulleyn & Ellison, for H. H. Brown, Town Clerk, Gravesend.*

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(1) [1918] W. N. 111.

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R. HOE AND COMPANY, LIMITED *v.* DIRS.

Workmen's Compensation—Accident to fitter causing loss of sight in one eye—Subsequent partial incapacity—Offer of work as fitter—Refusal —Risk of losing remaining sound eye—" Suitable employment "— Reasonableness of refusal—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 3 (i.).

The Workmen's Compensation Act, 1925, s. 9, sub-s. 3, provides : " The rules for calculating the weekly payment in the case of partial " incapacity shall be—(i.) If the maximum weekly payment would, " had the incapacity been total incapacity, have amounted to " twenty-five shillings a week or upwards, the weekly payment in " case of partial incapacity shall be one-half the difference between " the amount of the average weekly earnings of the workman " before the accident and the average weekly amount which he is " earning or is able to earn in some suitable employment . . . . " after the accident " :—

Held, that when a workman who has met with an accident arising out of and in the course of his employment causing the loss of the sight of one eye is offered, but refuses, work of the same sort involving risk of injury to the remaining sound eye, the work offered is not " suitable employment " so as to entitle the employers to have his compensation during partial incapacity calculated by reference to the weekly wage he would have earned in that employment.

APPEAL from the award of His Honour Judge Bensley Wells sitting at Southwark County Court, as arbitrator under the Workmen's Compensation Acts.

A workman, George W. Dirs, was employed as a fitter by R. Hoe & Company, Ld., at highly skilled work at an average weekly wage of 4*l.* a week. On August 28, 1933, he met with an accident as a result of a drill breaking and practically lost the sight of one eye. After the accident he received compensation for a time at 30*s.* a week, and then when given less skilled work by the employers, smaller amounts of compensation, until, by an award dated November 11, 1937, the compensation was increased to 30*s.* a week. Subsequently he obtained employment as a nurseryman and his compensation was reduced by agreement to 19*s.* 2*d.* a week. Shortly after the outbreak of war he ceased to be employed as a nurseryman and on March 19, 1940, the employers suggested to him that he should interview Mr. Hooper of Vickers, Ld., as that company had work available for a fitter which he could do. The workman declined to follow this up, as he felt that in resuming work in an engineering shop he would run a danger of losing his remaining sound eye. He was then expecting to obtain work again as a nurseryman, and on April 1, 1940, he again obtained that employment, receiving an average wage of 2*l.* 9*s.* a week.

On April 20, 1940, the employers applied for a review and termination of the weekly payments of compensation, but the workman resisted this, while submitting to a reduction of the compensation to 15*s.* 6*d.* a week in view of his earnings as a nurseryman.

The workman gave evidence that on two occasions since the accident he had had minor accidents to his eye while working for the employers. He admitted that if he wore glasses with special protecting sides, such as were shown to him, the risk to the eyes while at work in a fitter's shop would be greatly reduced. Mr. Langford, who was the head foreman of the fitting department at Vickers, Ld., gave evidence that that company had fitters' work available and that he would employ a one-eyed man on work at which he would earn 3*l.* 15*s.* 11*d.* for a forty-seven hour week. There was, however, always a risk to eyes in works like Vickers.

The county court judge said that the workman was not able to do the highly skilled work which he did before the accident but was capable of doing work as a fitter or mechanic not requiring so high a degree of precision. The workman's reluctance to accept work in an engineering shop was due to a fear that he might sustain some injury to his remaining sound eye. He was satisfied by the evidence that men employed as fitters in any engineering shop must run a risk of injury to the eyes which could not be eliminated by the wearing of special glasses. He was satisfied, too, that the workman could have obtained employment with Vickers, Ld., if he had applied for work before June 10, 1940, when under the Undertakings (Restriction on Engagement) Order, 1940 (St. R. & O., No. 877 of 1940), it became impossible to take the workman from his work as a nurseryman.

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Under s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925, compensation during partial incapacity was to be half the difference between the workman's pre-accident earnings and "the average weekly amount which he is "earning or is able to earn in some suitable employment ". . . . after the accident." Further, the decision of the House of Lords in *Heathcote* v. *Haunchwood Collieries, Ld.* (1), established that where a partially incapacitated man had found employment it was open to the employers to show that he was able to earn more in some suitable and available employment, but that, even if it were shown that a more remunerative suitable employment was available, the arbitrator might nevertheless fix the compensation by reference to the man's actual employment if he was satisfied that the acceptance of the less remunerative work was not unreasonable.

The county court judge was of opinion that the workman had not acted unreasonably and he would therefore assess the workman's compensation by reference to his average weekly earnings as a nurseryman. He gave as his reasons for an award of 15*s*. 6*d*. a week—(1.) that the only work alleged to be available was not in fact available by reason of the Undertakings (Restriction on Engagement) Order, 1940; (2.) that if he were wrong as to this, the workman had acted reasonably, for a man who had already lost the sight of one eye by an accident had very good reason to prefer an employment which involved no risk of injuring the other eye; and (3.) that the only more remunerative work available to the workman was not suitable work. He took this view in spite of the conflict of judicial opinion on the question whether an employment could be regarded as unsuitable simply because the result of a subsequent accident might be more serious to the particular individual and relied on what was said by Fletcher Moulton L.J. in *Eyre* v. *Houghton Main Colliery Co.* (2)

The employers appealed. The appeal was heard on October 31, 1940.

J. H. C. Goldie for the appellants. The county court judge

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(1) [1918] A. C. 52.

(2) [1910] 1 K. B. 695, 700.

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was wrong in holding that the Undertakings (Restriction on Engagement) Order, 1940, prevented the work at Vickers, Ld., from being open to the workman. The critical date was when the man was advised to approach Vickers, Ld., and he was not then employed as a nurseryman. Even if this were not so, the material date was the date of the application for a review and that was before the order was made: *Morton & Co., Ld.* v. *Woodward.* (1) The judge was clearly wrong therefore in treating the date of the arbitration as the material date.

Again there was no evidence on which the judge could find, applying *Heathcote* v. *Haunchwood Collieries, Ld.* (2), that the work at Vickers, Ld., would endanger the workman's remaining eye so as to render that work one not to be taken into account in fixing the compensation under s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925, or to justify his refusal of it. It was a "suitable" employment within that provision, for it was shown that any risk to the eye would be almost entirely eliminated by the man using goggles with protective side pieces. It might be said on humanitarian grounds that he was justified if there was the least risk, but there is a great difference of authorities as to whether this is a matter that may be taken into account. So to hold would involve making the original employers liable for possible risk to the sound eye, and the House of Lords decided that this was not right in *Hargreave* v. *Haughhead Coal Co.* (3)

The matter first came before the Court in *Eyre* v. *Houghton Main Colliery Co.* (4), but that case is distinguishable because there were considerations, apart from the fact that the man was a one-eyed man, that made the work he was offered unsuitable. There was evidence that he could not see the flying coal so well. It is true that Fletcher Moulton L.J. there took the view that an employment might be treated as unsuitable because the results of a subsequent accident might be more disastrous to the particular workman. (5)

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(1) [1902] 2 K. B. 276.
(2) [1918] A. C. 52.
(3) [1912] A. C. 319.
(4) [1910] 1 K. B. 695.
(5) Ibid. 700.

The matter was again considered in *Jackson* v. *Hunslet Engine Co.* (1), but this case also was distinguishable for a similar reason. It is contended that in view of the decision in *Hargreave* v. *Haughhead Coal Co.* (2) regard cannot be had to the increased risk of the workman's becoming blind. Support for this view is to be found in *Law* v. *William Baird & Co., Ld.* (3)

W. H. Duckworth for the respondent was not called upon.

SIR WILFRID GREENE M.R. The first question which arises for decision turns upon the meaning of one word, read in its context, in s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925. That paragraph sets out the rules for calculating the weekly payment in the case of partial incapacity. It is to be "one-half the difference between the "amount of the average weekly earnings of the workman "before the accident and the average weekly amount which "he is earning or is able to earn in some suitable employment "or business after the accident." The word which falls to be construed is the word "suitable."

The work which was apparently open to the workman at Vickers in March, 1940, involved danger to the eyes. The workman when giving evidence was shown some special glasses with protecting sides and he said that the risk to the eyes while at work in the fitters' shop would be greatly reduced by such glasses. Mr. Goldie informed us that the answer of the witness was a little bit stronger than that, namely, that the risk would be practically or almost entirely eliminated, or words to that effect. But the workman said in re-examination that since the accident, while he was still working as a fitter, he had had his glasses broken.

Even admitting Mr. Goldie's correction, if it be justified, of the learned judge's note, it seems to me still to leave the matter in the position that, although the protecting sides would give him substantial protection against risk at the sides, the risk of a direct injury to the eye through the glasses being fractured still remained. The head foreman of the fitting department of Vickers, who was called as a witness, said that there was always a risk to eyes in the work of fitters. The learned county court judge, in dealing with that part of the case, held as a fact that men employed as fitters in any engineering shop must run a risk of injury to the eyes. In my opinion, there was ample evidence to justify him in that conclusion.

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(1) [1916] 2 K. B. 8.
(2) [1912] A. C. 319.
(3) 1914 S. C. 423; 7 B. W. C. C. 846.

Assuming that work in the fitters' shop would have been available to this workman, the question then arises whether, for the purpose of measuring his weekly payment in respect of the original accident, he is to be treated as in effect bound to accept that employment so as to reduce the employers' liability in respect of the original accident. Was such employment suitable ?

It does not require evidence to show that the loss of the remaining eye of a one-eyed man is a very much more serious thing than the loss of one eye to a two-eyed man. The great controversy in the present case has been whether or not that circumstance is one that can be taken into consideration in deciding the question whether or not a particular occupation offered is " suitable " in the circumstances.

If I may express my opinion, quite apart from anything that has been said before on this topic, I must confess that I can find no real difficulty in construing the word " suitable " in relation to the facts of this case. It seems to me, first, that the word " suitable " is relative to the man. It is not " suitable " for anybody ; it is " suitable " for the particular man. The physical condition of this man, by reason of the former accident, is such that the risks which he would run would be much more serious than those run by ordinary normal men in a similar occupation. Once it is realized that the question is whether the work is suitable for a one-eyed man, not whether it is suitable for men in general, it seems to me quite impossible to eliminate from consideration the crucial fact that the man in question has only one eye. The fact that he has only one eye is due to the accident which he has suffered. Is he to be forced to surrender part of the compensation to which the original accident entitled him and to take up an employment of this character? In my opinion, looking at the matter quite apart from authority, the answer to that question is reasonably clear. But I feel some difficulty in asserting that it is reasonably clear, because it has been a matter which has led to some difference of judicial opinion.

I do not propose to go through the cases which have been cited to us. The first one is *Eyre* v. *Houghton Main Colliery Co.* (1) It is sufficient to say that in that case Moulton L.J. considered that the fact that a man had one eye, and that the loss of an eye would be a matter of much greater seriousness to him than to a person with two eyes, was a factor which might properly be taken into consideration in determining whether a particular job was suitable for that particular man. Buckley L.J. did not agree with that view, and, if I read his judgment rightly, Sir Herbert Cozens-Hardy M.R. did not express an opinion upon it.

In the later case of *Jackson* v. *Hunslet Engine Co.* (2) Lord Cozens-Hardy agreed with what Moulton L.J. had said in *Eyre's* case (1), and so did Sargant J., but Phillimore L.J. disagreed.

If it is open to me to decide this question according to my own opinion, unfettered by authority, I should decide it in the way which I have indicated. If there is authority upon it which is binding upon us, it appears to me to be authority upon that side. But I apprehend that the question is really open. Therefore, our decision is one which decides that point.

It was said that the case of *Hargreave* v. *Haughhead Coal Co.* (3), a decision of the House of Lords, really assisted the argument of the employers here. With great respect, I cannot see myself what bearing that case has upon the present question. The present question deals with particular language in a particular section and its applicability to a particular set of facts. I cannot find that the point in *Hargreave's* case (3) has any real bearing upon the present case, or deals with any principle which is common to that case and to this.

One further case was cited, *Law* v. *William Baird & Co., Ld.* (4), which is a Scottish case. It was cited for the purpose of

(1) [1910] 1 K. B. 695.
(2) [1916] 2 K. B. 8.
(3) [1912] A. C. 319.
(4) 1914 S. C. 423; 7 B. W. C. C. 846.

calling our attention to a view expressed by the Lord President to the effect that, if the consequences of the loss of the remaining eye were legitimate matters to be taken into account, the effect would be to cause the employer in whose employment the original accident took place to assume responsibility for a contingent accident to the remaining eye in future which might or might not take place. There may be some defect in the logical working of my mind, but, speaking with great respect to that argument, I am not able to follow it. It does not seem to me that the effect is to make the employer liable in respect of an accident which may happen in the future quite unconnected with the original accident. The true effect seems to me to be that, the original accident having occurred in the employment of the employer, the man's position and physical status as a workman is entirely changed and he is to be dealt with on the footing that he is an injured man whose injury has put him in the position that what to an ordinary man would be a legitimate risk to take has become a risk which it is wholly unreasonable to ask him to take. That circumstance seems to me to flow from the original accident.

There was another point. In the appeal it was said that the learned county court judge ought to have regarded the position as at the date when the application for review was made. The point of that is that he treated himself as entitled to consider the situation in view of the passing of the Undertakings (Restriction on Engagement) Order, 1940, the effect of which was that as from the date of that Order employment at Vickers was denied to this man. It was said that the judge ought to have regarded the matter as at an earlier date, namely, at a time when that Order had not come into force, and when, therefore, the employment at Vickers was available to this man. It is not necessary to express any view on that point, because it only arises upon the footing that the work at Vickers was work which was suitable, and, therefore, work which the workman could properly be called upon to accept. As in my view the work was not suitable, that point does not arise, and, therefore, I express no opinion upon it.

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I would like in conclusion to say that Mr. Goldie's extremely clear and moderate argument has been of the greatest assistance to me in coming to a conclusion in this case.

CLAUSON L.J. I agree. In the interests of brevity I will only say this. In my judgment, the indication of opinion on the point at issue which appears in Fletcher Moulton L.J.'s judgment in *Eyre* v. *Houghton Main Colliery Co.* (1) is a correct statement of the law. It seems to me to be correct, not only for the reasons indicated by the Lord Justice, but also for the reasons indicated by Sargant J., when he dealt with the same point in *Jackson* v. *Hunslet Engine Co.* (2)

GODDARD L.J. I agree. When listening to Mr. Goldie's attractive argument and the cases he cited, I thought it well to remind myself of what was recently said by Lord Wright in the House of Lords in *Harris* v. *Associated Portland Cement Manufacturers, Ld.* (3) The noble and learned lord there said this: "I am reluctant to repeat the warning so often "reiterated in this House of the danger of superseding the "words of the Legislature by language used by judges in "particular cases and with reference to the facts of the "particular cases in order to explain how they arrived at the "particular decisions." A little later on Lord Wright said: "I venture to add that the tendency to disregard the words "of the Act and substitute extracts from judgments is largely "responsible for the accretion of thousands of cases round a "legislative measure which was intended to be administered "rather than litigated upon."

The words we have to construe are "the average weekly "amount which he is earning or is able to earn in some "suitable employment or business after the accident." I cannot help thinking if those words had to be construed by somebody who did not labour under the considerable disadvantage of having at his elbow a copy of the Workmen's Compensation Reports and the various textbooks on the subject, he would have no difficulty in saying that " suitable " meant " suitable," and that work which involved danger to the eyes was not suitable work for a one-eyed man. If there were authority which bound me to come to another decision, then in spite of the passage which I have read from Lord Wright's speech, I should have to do it, but I am happy to think that, as the Master of the Rolls has pointed out, the trend of authority is all the other way.

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(1) [1910] 1 K. B. 695, 700.
(2) [1916] 2 K. B. 8.
(3) [1939] A. C. 71, 89.

I think that this case is really quite clear. The learned county court judge has found, and on the evidence he was abundantly justified in finding, that the particular work which was offered to this man would have a tendency to be dangerous to eyesight, and would involve the risk of the man losing an eye. If, therefore, he is a man starting on that work with only one eye, I cannot see myself that anyone can say that work would be suitable for him. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Carpenters; Bryan O'Connor & Co.*

H. C. G.

1940
Oct. 2, 7.

NESTA, LIMITED *v.* WYATT AND ANOTHER.

Revenue — Income tax — Royalty — Payment previous to passing of annual Act imposing income tax—Omission to deduct tax—Right to recover from royalty owner amount overpaid—Provisional Collection of Taxes Act, 1913 (3 *Geo.* 5, *c.* 3), *s.* 1, *sub-s.* 1*—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 211, *sub-s.* 2 ; *All Schedules Rules, r.* 21, *sub-r.* 1.

In making a payment of royalties, which had not been brought into charge, at a time previous to the passing of the annual Finance Act imposing income tax, the payers omitted to deduct the tax and sought to recover the amount overpaid under the provisions of s. 211, sub-s. 2, of the Income Tax Act, 1918 :—

Held, that, although the tax might have been deducted by the payers under s. 1 of the Provisional Collection of Taxes Act, 1913, nevertheless sub-s. 2 of s. 211 applied, and the payers were entitled to recover.

Dictum of Scrutton L.J. in *Hill* v. *Kirshenstein* [1920] 3 K. B. 556, 565, 566, that sub-s. 2 of s. 211 only applied where the tax when deducted was not to be accounted for to the Crown, not followed.

ACTION tried by Macnaghten J. against the executors of one Eric Eldridge Johnson.

The plaintiffs, Nesta, Ld. (the " company "), had acquired an upholstering business, and among the assets was a certain patent. The deceased, E. E. Johnson, the principal shareholder, had lent money to the company, and held a mortgage on this patent as security. By agreement with the company he was entitled to a royalty on all articles manufactured by them under this patent. At the time of his death in March, 1937, 1676*l.* 9*s.* 11*d.* was due to him in respect of these royalties. On May 24, 1937, the company paid this sum to the defendants, the executors, but by mistake omitted to deduct income tax from that portion of the royalties which were not paid out of profits or gains brought into charge as they were required to do under r. 21 of the General Rules applicable to all Schedules to the Income Tax Act, 1918. The tax amounted to 392*l.* 13*s.* 10*d.*, and this action was brought claiming repayment of that sum under the provisions of s. 211, sub-s. 2, of the Income Tax Act, 1918 (1), the Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 54), which imposed the tax for the year, not being passed until July 30, 1937.

(1) Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3), s. 1: "(1.) Where a resolution is "passed by the Committee of "Ways and Means of the House "of Commons (so long as it is a "Committee of the whole House) "providing for the variation of "any existing tax, or for the "renewal for a further period of "any tax in force or imposed, "during the previous financial "year, whether at the same or a "different rate, and whether with "or without modifications, and "the resolution contains a declaration that it is expedient in the "public interest that the resolution should have statutory effect "under the provisions of this Act, "the resolution shall, for the "period limited by this section, "and subject to the provisions of "this Act, have statutory effect "as if contained in an Act of "Parliament, and, where the "resolution provides for the "renewal of a tax, all enactments "which were in force with reference to that tax as last imposed "by Act of Parliament shall, "during the said period, and "subject to the provisions of this "Act, have full force and effect "with respect to the tax as "renewed by the resolution."

Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 211, sub-s. 2: "Any person liable to pay any "rent, interest or annuity, or to "make any other annual payment, shall be authorised to "make any deduction on account "of tax for any year of assessment "which he has failed to make "previously to the passing of the "Act imposing the tax for that "year, or to make up any deficiency in any such deduction "which has been so made, on the "occasion of the next payment of "the rent, interest or annuity, or "making of the other annual "payment after the passing of the "Act so imposing the tax, in "addition to any other deduction "which he may be by law authorised to make, and shall also be "entitled, if there is no future "payment from which the deduction may be made, to recover "the sum which might have been "deducted as if it were a debt "due from the person as against "whom the deduction could "originally have been made if the "Act imposing tax for the year "had been in force."

General Rules applicable to Schedules A, B, C, D and E. Rule 21: "(1.) Upon payment of "any interest of money, annuity, "or other annual payment charged "with tax under Schedule D, or "of any royalty or other sum paid "in respect of the user of a patent, "not payable, or not wholly "payable out of profits or gains "brought into charge, the person "by or through whom any such "payment is made shall deduct "thereout a sum representing the "amount of the tax thereon at the "rate of tax in force at the time "of the payment."

By sub-r. 2 such person shall render an account to the Commissioners of Inland Revenue of the amount so deducted, and it is to be a debt from him to the Crown.

Frederick Grant for the plaintiffs.
Scrimgeour for the defendants.

Cur. adv. vult.

1940. Oct. 7. MACNAGHTEN J. In this action the plaintiffs, Nesta, Ld., seek to recover from the defendants, who are the executors of Eric Eldridge Johnson, deceased, the sum of 392*l.* 13*s.* 10*d.*, as a debt due from the defendants to them under the provisions of sub-s. 2 of s. 211 of the Income Tax Act, 1918.

That sub-section was a re-enactment of sub-s. 2 of s. 14 of the Revenue Act, 1911 (1 Geo. 5, c. 2) (repealed by s. 238 and Sch. VII. of the Act of 1918), which was passed for the purpose of obviating a difficulty which arose where a person who was authorized or required to deduct income tax from rent, interest or any other annual payment, made such a payment before the annual Finance Act imposing the income tax had come into force. The sub-section authorizes the person making such payment before the Finance Act is passed to deduct the income tax thereon from the next payment and, in a case where there is no future payment to be made by him, the sub-section enables him to recover the sum which might have been deducted as if it were a debt due from the person against whom the deduction could have been made if the Act imposing the tax for that year had been in force at the time of the payment. The question at issue between the parties is as to the meaning and effect of the sub-section.

As to the facts of the case, there is little or no dispute between the parties. Nesta, Ld., was incorporated in 1914 for the purpose of acquiring the upholstering business previously carried on by a Mr. Jessup at Old Street, in London. The agreement between Mr. Jessup and Nesta, Ld., for the sale and purchase of the business is dated October 15, 1914, and one of the assets included in the sale was a British patent No. 27,457, dated December 17, 1908, for an invention relating to improvements in mattresses, cushions, seats and other upholstered surfaces.

Mr. E. E. Johnson, the deceased, who was the principal shareholder in Nesta, Ld., and who had also advanced money to the company for the purpose of its business, held a mortgage on this patent to secure repayment of money advanced by him and, by agreement with the plaintiff company, he was entitled to payment of a royalty in respect of all articles manufactured by the company in accordance with the patent. During the first years of its existence, Nesta, Ld., was unable to pay Mr. Johnson all the royalties which were due to him under that agreement, and, by March, 1921, the royalties which had accrued due and were unpaid amounted to 1819*l.* 7*s.* 1*d.*

On March 2, 1921, Mr. Johnson addressed the following letter to the secretary of the company: "With reference to "the agreement that has existed between your company and "myself since 1914, whereby, in consideration of a loan of "1065*l.* 2*s.*, I receive a royalty of one penny per square foot "on all Nesta spring fillings manufactured, I am prepared "to relinquish my rights under this agreement, as from "September 30 last, provided your directors agree the "following conditions: (1.) A salary at the rate of 500*l.* per "annum be voted to me; (2.) the above-mentioned loan of "1065*l.* 2*s.* be incorporated in my existing No. 2 loan at the "same rate of interest, viz. 8 per cent.; (3.) that the accrued "royalties amounting to 1819*l.* 7*s.* 1*d.* be repaid by a sum "not less than 200*l.* per annum in equal half-yearly payments. "I should be obliged if you would take an early opportunity "of placing this proposition before your directors." At a meeting held on March 14, 1921, the directors of the company decided to accept Mr. Johnson's proposal. Their decision was subsequently confirmed at the next annual general meeting of the company, and, pursuant to this agreement, on July 21, 1921, Nesta, Ld., paid to Mr. Johnson the sum of 100*l.*

By r. 21, sub-r. 1, of the General Rules applicable to All Schedules to the Income Tax Act, 1918 (1), it is provided that, upon the payment of any royalty "not payable, or not "wholly payable out of profits or gains brought into charge,

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(1) See note (1), ante p. 45.

"the person by or through whom any such payment is made "shall deduct thereout a sum representing the amount of the "tax thereon at the rate of tax in force at the time of the "payment."

The 100*l.* so paid by the company to Mr. Johnson on July 21, 1921, was not paid out of profits or gains brought into charge, because in fact the company made no profits that year. It was, therefore, the duty of the company to deduct tax from any payment made to Mr. Johnson on account of royalties due to him. The sum of 142*l.* 17*s.* 2*d.*, after deducting income tax therefrom at the standard rate for that year (1921), amounted to 100*l.*, the sum actually paid to Mr. Johnson. Accordingly, the payment of 100*l.* was treated as between the company and Mr. Johnson as a payment of 142*l.* 17*s.* 2*d.* and the unpaid royalties were accordingly reduced by that sum from 1819*l.* 7*s.* 1*d.* to 1676*l.* 9*s.* 11*d.* The audited accounts of the company for the year 1921, which were duly approved by the company in general meeting, showed the sum of 1676*l.* 9*s.* 11*d.* as due to Mr. Johnson on royalty account at the end of the company's financial year.

Mr. Johnson died in March, 1937, but no further payment had been made to him on account of the royalties after July 21, 1921, and the sum of 1676*l.* 9*s.* 11*d.* was therefore due to the defendants, as his executors.

On May 24, 1937, Nesta, Ld., paid that sum to the defendants. By mistake they omitted to deduct income tax from it and they now bring this action to recover the tax on so much of the royalties as were not paid out of profits or gains brought into charge, for it so happened that in the financial year beginning April 6, 1937, the company made a small profit and part of the royalties were paid out of profits or gains which had been brought into charge.

The provisions of sub-s. 2 of s. 211 of the Income Tax Act are as follows: [His Lordship read the sub-section: (1)] As I have said, on May 24, 1937, payment was made, but the Finance Act for that year did not receive the Royal Assent until July 30, 1937. The whole amount of the royalties which had accrued due were paid on that date, May 24, and, therefore, there was no future payment from which the plaintiff company could make any deduction. The plaintiffs, therefore, claim under the final provisions of the sub-section to recover the sum which might have been deducted if the Act had been in force on May 24 " as if it were a debt due " from the defendants.

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(1) See note (1), ante p. 45.

There are three answers put forward to this claim. In the first place, it is said that the payment of the 1676*l.* 9*s.* 11*d.* on May 24, 1937, was not a payment of royalties at all; that the transaction which took place in March, 1921, was a transaction whereby Mr. Johnson lent the amount then due to the company; and that the company, out of the money so lent, in fact then paid all royalties so that all that was left as between the parties was a simple contract debt arising from a transaction of loan.

I do not think that there is any ground on which that contention can be based. It is plainly contrary to the terms of the letter of March 2, 1921, which I have read, but what perhaps is even more significant is that it is entirely contrary to what actually happened when, in pursuance of that agreement, the plaintiff company paid 100*l.* to the late Mr. Johnson on July 21, 1921. As I have pointed out, that payment was treated as a payment of 142*l.* 17*s.* 2*d.* and the difference between the 100*l.* and the 142*l.* 17*s.* 2*d.*, being the amount of the tax on that sum, was deducted, so that the actual payment to Mr. Johnson was the agreed half-yearly payment of 100*l.* Throughout, in the books of the company and in the books of Mr. Johnson, the balance remaining after giving credit for 142*l.* 17*s.* 2*d.*, namely, 1676*l.* 9*s.* 11*d.*, was treated as a payment due from the company to Mr. Johnson on account of the royalties which had accrued due to him before September 13, 1920.

The second point that was raised was based on a statement contained in a judgment of Scrutton L.J. in *Hill* v. *Kirshenstein.* (1) That was a case in which a question arose as to the right of a tenant who pays a sum in respect of

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(1) [1920] 3 K. B. 556.

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landlord's property tax and omits to deduct it from his next payment of rent, nevertheless to make the deduction from a subsequent payment of rent. One of the arguments in the case was that, although the authorities prior to 1911 made it plain that no such deduction could be made, sub-s. 2 of s. 211 of the Income Tax Act, 1918 (1), had altered the law. In the course of his judgment, Scrutton L.J. said (2): "It was "argued that this general enactment"—the general enactment that you must deduct from the next payment of rent, and, if you do not deduct from the next payment of rent, you cannot deduct at all—"has been altered by the special "provision contained in section 211 of the Act of 1918, which "reproduces section 14 of the Revenue Act, 1911. That "section deals with two cases. Sub-section 1 applies where "the tax is to be accounted for to the Crown; sub-section 2 "applies where the tax is not to be accounted for to the "Crown." Admittedly in this case the tax, since it was not paid out of profits or gains brought into charge, would have to be accounted for to the Crown and, therefore, if Scrutton L.J.'s statement is correct, the provisions under which the plaintiffs base their claim have no application at all and the claim must fail. The statement made by Scrutton L.J. was not necessary for the decision at which the Court of Appeal arrived, affirming the judgment of Darling J.; it was obiter dictum. Nevertheless it is my duty, of course, to pay regard to it, unless I can see good reason to the contrary. I asked learned counsel whether they could furnish any reason for the limitation which the learned Lord Justice placed upon sub-s. 2 and neither of them was able to furnish any reason at all. There is nothing that I can see in s. 211 which supports the statement made by the learned Lord Justice. There is high authority for the statement that even a Lord Chancellor may possibly make a mistake. (3) Therefore, I think that I am at liberty to say that even a Lord Justice may possibly make a mistake. But what seems to me perhaps a more probable explanation is that the learned

(1) See note (1), ante p. 45.

(2) [1920] 3 K. B. 565.

(3) *Hatton* v. *Harris* [1892] A. C. 547, 564, per Lord Macnaghten.

Lord Justice has been misreported. It is quite true that sub-s. 1 of s. 211 expressly provides for the payer accounting to the Crown, whereas sub-s. 2 does not do so. Sub-s. 2 does not do so because the provisions requiring the person making the deduction to account to the Crown are to be found in the General Rules and it may be that the learned Lord Justice was calling attention to that difference between the two sub-sections and, by some misplacement of words, the statement appears in the authorized report in its present form and in a form which, so far as I can see, is not correct. I, therefore, am unable to accept the argument that sub-s. 2 of s. 211 does not apply where the deduction is not made out of profits or gains brought into charge. In my view, the sub-section does apply to those cases.

Then there was a third point raised, namely, that, although the Finance Act, 1937, was not passed until July 30, a few months after the payment was made, the plaintiff company might have deducted the tax under the provisions of the Provisional Collection of Taxes Act, 1913. (1) That is the Act which was passed, in consequence of the litigation (2) successfully brought by the late Mr. Gibson Bowles, to give temporary validity for a limited period to the budget resolutions which are passed on Budget Day.

In the year 1937 the budget provisions relating to income tax were passed on April 20, 1937, and, therefore, under the Provisional Collection of Taxes Act, 1913 (2), all the provisions of the Income Tax Act were made applicable temporarily and the deduction, it is admitted, might have been made by Nesta, Ld., if they had been minded to do so. It is said, therefore, that the very mischief which sub-s. 2 of s. 211 of the Income Tax Act was intended to remedy did not exist and that in truth, when s. 14 of the Revenue Act, 1911, was repealed by and re-enacted in the Income Tax Act, 1918, the wording of the re-enactment ought to have been modified so as to accord with the provisions of the Provisional Collection of Taxes Act, 1913. The mischief under s. 14 of

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(1) See note (1), ante p. 45.

(2) See *Bowles* v. *Bank of England* [1913] 1 Ch. 57.

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the Revenue Act, 1911, might, however, still exist, because the financial year commences on April 6 and Budget Day never can be before that date because it cannot take place until after the close of the financial year, and the mischief would exist between April 6 and Budget Day. Parliament, when it passed the Income Tax Act, 1918, did not modify or alter the provisions of s. 14 of the Revenue Act, 1911. In that Act the words are plain: that, if the payment is made before the passing of the Act imposing income tax, the provisions of s. 211, sub-s. 2, take effect and in such a case as the present where there is no future payment, that is to say, no payment becoming due to be made after the passing of the Finance Act, the person who has paid without making deduction can "recover the sum which might have been deducted as if it "were a debt due from the person as against whom the "deduction could originally have been made if the Act "imposing tax for the year had been in force."

In my view, therefore, the plaintiffs' claim in this action is well-founded and judgment must be entered for them for 392*l.* 13*s.* 10*d.*, the amount of tax at the standard rate of 5*s.* for the year 1937 on the sum of 1570*l.* 15*s.* 7*d.*, which is the amount of the royalties that were not paid out of profits or gains brought into charge for income tax.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Baileys.*
Solicitors for defendants: *Waltons & Co.*

W. L. L. B.

C. A.

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Aug. 14, 15, 16; *Sept.* 19.

THE KING *v.* CITY OF WESTMINSTER ASSESSMENT COMMITTEE.

Ex parte GROSVENOR HOUSE (PARK LANE), LIMITED.

Rates—Metropolis—Assessment committee—Hearing of objection to provisional list—Disregard of evidence — Report of " competent " person "— Non-disclosure — Certiorari — Mandamus —Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47*—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 38.

At the hearing of an objection to a provisional valuation list the ratepayers gave evidence by their surveyor as to the amount by which the rateable value of their hereditament had been reduced by reason of " causes " within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869. Evidence also was given by the surveyor of the rating authority, agreeing the figures arrived at by the representative of the ratepayers. No other evidence was before the assessment committee. The committee rejected the agreed figures and fixed the assessment at a higher amount. It appeared from an affidavit sworn on behalf of the committee in subsequent proceedings in the King's Bench Division by the ratepayer that, when arriving at its determination, the committee had before it a general report by an expert valuer " as " to the effect of the war on the value of various classes of " business premises, including hotels, and as to the factors producing such effect." This document was not disclosed to the ratepayers, who therefore had no opportunity of correcting or contradicting it :—

Held, that an assessment committee is not bound to accept the only evidence placed before it, even though it be agreed by both sides to the controversy. It is entitled to act on its own expert knowledge, but the fact that it is entitled in the exercise of its powers under s. 38 of the Rating and Valuation Act, 1925, to obtain a report from a " competent person " for its own guidance does not relieve it of the duty, when hearing an objection under s. 47 (6.), to disclose that report, or the relevant parts of it, to the persons affected, so as to give them a fair opportunity of correcting or contradicting any statement prejudicial to their view.

Per Scott L.J. A report obtained before the date of the hearing of an objection should be regarded as merely one of the sources from which the committee properly obtains its information, and there would be no duty to disclose at the hearing that particular source, any more than any other source, of its expert knowledge.

Per Clauson and du Parcq L.JJ. It makes no difference whether the report was obtained before or after the commencement of the hearing, or that it was of a general and not specific character.

Decision of Divisional Court [1940] 2 K. B. 350 affirmed, but on different grounds.

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REX
v.
CITY OF
WESTMINSTER
ASSESSMENT
COMMITTEE.
GROSVENOR
HOUSE
(PARK LANE),
LD.,
Ex parte.

APPEAL from a Divisional Court.

On May 30, 1940, Grosvenor House (Park Lane), Ld., who carried on a hotel and restaurant business in London, moved the Divisional Court that a writ of certiorari should issue to remove into the King's Bench Division, for the purpose of being quashed, a determination by the assessment committee of the city of Westminster, given in a letter dated December 19, 1939, that the provisional valuation list be amended by adding to the description of the applicants' hotel premises the words "as affected by emergency legislation, regulations and "orders," and substituting for the values appearing in the list the following values, namely, "gross value, 25,800*l.*; net "annual rateable value, 21,497*l.*" The applicants also moved for an order that a writ of mandamus should issue to the assessment committee to determine the applicants' objection to the provisional valuation by substituting for the values entered in the list in respect of the said premises the following values: gross value, 16,125*l.*; net annual rateable value, 13,434*l.*

The following statement of the facts is taken from the judgment of Scott L.J. :—

In the quinquennial valuation list, made in the year 1935, the company were assessed in respect of Grosvenor House at a gross annual value of 32,250*l.* and a net annual value of 26,872*l.* After the war began the takings of the company's business fell off seriously, and the company took the view that there had been a reduction in the annual value of the hereditament from a "cause" within the meaning of the opening sentence of s. 47 of the Valuation (Metropolis) Act, 1869. (1) On September 28, 1939, they accordingly, under sub-s. 1, gave notice of requisition to Westminster City

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(1) Valuation (Metropolis) Act, 1869, s. 47: "If in the course of "any year the value of any "hereditament . . . . is from "any cause . . . . reduced in "value, the following provisions "shall have effect :—

"(1.) The overseers of the "parish in which such heredita- "ment is situate may, and on "the written requisition of the "assessment committee or of any "ratepayer of the union shall "... . send to the assessment "committee a provisional list "containing the gross and rate- "able value as so . . . . "reduced of such hereditament."

"(4.) An objection may be "made to any such provisional "list by the said occupier, and "by the surveyor of taxes, or

Council (who had become the rating authority under s. 7, sub-s. 2, of the Rating and Valuation (Apportionment) Act, 1928, in place of the overseers) to make a provisional list. This was duly made, but as the rating authority repeated in their provisional list the figures of the quinquennial list, the company gave notice of objection that the assessment was excessive, on the ground that the value of the hereditament had been reduced by a " cause " within s. 47, namely, a falling off of the takings by reason of circumstances resulting from the war. By letter dated October 24, they had asked that the figures of 1000*l.* gross and 830*l.* rateable should be inserted. By letter dated November 30 the assessment committee gave notice that the objection would be heard on December 6, and added: " If you will be good enough, prior to the meeting, " to submit to the City Valuer a note of the following " particulars it will facilitate the hearing of your case:— " (*a*) A comparison of gross receipts for September, October, " and November, 1937, 1938 and 1939. (*b*) Particulars of your " clients' liabilities (if any) under the War Risks Insurance " Act, 1939. (*c*) Total expenditure on Air Raid Precautions." The hearing of the objection before the assessment committee took place on December 6, 1939. Mr. Faraday, surveyor on behalf of the company, and Mr. Bourdas, surveyor on behalf of the rating authority, attended, and were in agreement that there had been a reduction of value by a cause within s. 47. Mr. Faraday gave figures of the hotel takings for September, October, and November, showing a great drop in all three months as compared with the same months in 1937 and 1938. Both surveyors informed the assessment committee that in their opinion the proper figures to be inserted in the provisional list, instead of the existing figures, were 16,125*l.* gross and 13,431*l.* net. The assessment committee, on further consideration, on December 19, rejected the agreed figures of the two surveyors, but amended the provisional list by reducing the values

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" by either of them . . . . "
" (6.) The committee shall " hear and determine on the " objection in the same manner " as if it were an objection to a " valuation list, and may make " such order as they think just."

to 25,800*l.* gross and 21,497*l.* net. According to the affidavit of Mr. M. G. Giles, a member of the assessment committee, the material upon which the committee had arrived at their conclusion consisted first of the facts supplied by Mr. Faraday, and of his and the city valuer's arguments; secondly, of "a general report from Mr. Charles Gerald Eve, P.P.S.I., as "to the effect of the war upon the value of various classes "of business premises, including hotels, and as to the factors "producing such effect"; and thirdly, of the expert knowledge and experience of the assessment committee itself.

The grounds of the company's application to the Divisional Court were, shortly stated, that the assessment committee were bound to act upon the only evidence before them, that of the two surveyors, and were not entitled, when acting in a judicial capacity under sub-s. 6, for the purpose of determining the company's objection, to take into consideration the evidence of Mr. Eve, which it had not given the company an opportunity of answering.

The Divisional Court (Charles, Humphreys and Asquith JJ.) held that a rating assessment committee, sitting to hear objections to a provisional list under s. 47, sub-s. 6, of the Valuation (Metropolis) Act, 1869, is a judicial body, and is bound to exercise judicial discretion; that at the hearing of an objection, where valuers on both sides have agreed the figures and given their evidence, no other evidence being called, the committee is bound to accept the agreed figures and to determine the case accordingly; and that both writs must go, that of mandamus being simply to "hear and "determine according to law."

The assessment committee now appealed. The appeal was heard on August 14, 15, 16, 1940.

R. M. Montgomery K.C. (with him *Harold B. Williams*, for *M. E. Rowe*, on war service) for the appellants. The rights and duties of an assessment committee are defined by the Union Assessment Committee Act, 1862. They must hear any evidence or argument that anybody wishes to place before them, whether by an objector or the rating authority, but finally they must decide for themselves what is the right value of a particular hereditament. They are entitled to get the assistance of an independent valuer, under s. 38 of the Rating and Valuation Act, 1925, and while, of course, considering the evidence which has been given, they must not permit it to hamper their decision.

[SCOTT L.J. The question is whether it is fair, after they have heard, in their judicial capacity, the evidence and arguments tendered to them, that they should not give an objector, from whom the evidence and arguments have come, a chance of considering and answering a private report which they have received.]

The committee, in obtaining that report, were endeavouring to inform their own minds. They obviously thought that too high a proportion of the actual drop in values had been attributed by the objectors to matters which were in law causes for reducing the assessment. Mr. Eve's report was a general report on such matters.

[DU PARCQ L.J. I am quite clear that a judge is not entitled to get private advice without informing the parties.]

I agree, but here there are neither parties nor a court. The proceedings are not judicial in any sense, except that the committee has to come to a decision and must exercise discretion. Of course the committee must act judicially in the sense that it must not use its discretion arbitrarily or fancifully: per Lord Halsbury in *Sharp* v. *Wakefield.* (1) The Committee also has to bear in mind the importance of obtaining uniformity in assessments. Its duty is to consider every figure in the valuation list and to see that the list is fair as between one ratepayer and another, as well as correct. Even if the evidence placed before it is all one way the committee is not bound to accept it. It is entitled to consider whether the proper proportion of the fall in value has been attributed to causes which are deductible. By s. 38 of the Rating and Valuation Act, 1925, the committee is given specific power to obtain advice from an outside valuer, and is, I submit, in the same position with regard to such

(1) [1891] A. C. 173, 179.

advice as it is in with regard to the impressions which it has formed from its own experience. It is not bound to disclose either that advice or those impressions.

[DU PARCQ L.J. If the report of the outside valuer had been a document relating only to the particular hereditament would you agree that the committee ought not to act upon it without communicating it to the parties ?]

I would not.

[He also referred to *London County Council* v. *Islington Assessment Committee* (1); *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (2); and *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (3)]

Comyns Carr K.C. (*Frederick Grant* with him) for the respondents. I put forward three propositions: (1.) When the rating authority and the ratepayer have agreed the valuation the assessment committee has no authority to do anything but accept their agreement. (2.) There was before the assessment committee no evidence other than that of the two surveyors who had agreed the valuation. (3.) The assessment committee had no right to take into account the report of Mr. Eve, which was never communicated to the parties.

[DU PARCQ L.J. If it had simply accepted an agreement, would it not have been liable to a mandamus to hear and determine ?]

It is submitted not, for there would be no one aggrieved who could move for the order. The assessment committee has two quite separate and distinct duties—ministerial and judicial. It has to revise the general valuation list within a specified time after receiving it. Then it has finally to approve it. It is expressly authorized to make alterations, whether any one has objected or not; but if the committee does so it must give notice to the ratepayer affected. So far it is acting in a ministerial capacity. The ratepayer may object either to the original list or to the list as altered. There are thus two distinct stages: (1.) Revision of the list by the assessment committee, when no one else need be

(1) [1915] A. C. 762.
(2) [1918] A. C. 525.
(3) [1925] A. C. 309.

present, and (2.) hearing of objections, when evidence is given. When the committee is hearing objections it is acting in a judicial capacity. The procedure outside London under the 1925 Act is substantially the same as under the Union Assessment Committee Act, 1862, which was incorporated in the Valuation (Metropolis) Act, 1869, "so far as is consistent with the tenour thereof." It is quite consistent to incorporate the Act of 1862 in that part of the 1869 Act which deals with the making of the quinquennial valuations list, but quite inconsistent to incorporate it in the provisions as to provisional and supplemental lists, which contain a complete code of their own in s. 47 of the Act of 1869, which excludes the Act of 1862. The assessment committee has no jurisdiction to do anything with a provisional list, except as part of the hearing of objections.

As to uniformity of rating, it has now been decided, after a good deal of controversy, that the only method by which it is to be promoted is by making each assessment correct: see *Ladies' Hosiery and Underwear, Ld.* v. *West Middlesex Assessment Committee* (1); *Lilley and Skinner, Ld.* v. *Essex County Valuation Committee* (2); and *Rex* v. *Cornwall County Valuation Committee. Ex parte Falmouth Rating Authority.* (3) If the assessment committee had applied a uniform rule it had acted illegally (*Stirk & Sons* v. *Halifax Assessment Committee* (4)); and it would be a ground for quashing its decision.

As to the judicial character of the assessment committee, it is submitted that it cannot go outside a settlement by the parties, namely, the rating authority and the ratepayer; that it cannot go outside the evidence; and that it cannot act on evidence which is not disclosed to the parties: see *London County Council* v. *Shoreditch Borough Council* (5); *Rex* v. *N. Worcestershire Assessment Committee* (6); and *Rex* v. *N. E. Surrey Assessment Committee.* (7) The assessment committee is entitled to obtain information in any way it

(1) [1932] 2 K. B. 679.

(2) (1935) 153 L. T. 64; 51 Times L. R. 432.

(3) [1937] 2 K. B. 222.

(4) [1922] 1 K. B. 264.

(5) (1911) 105 L. T. 515.

(6) [1929] 2 K. B. 397, 406.

(7) [1933] 1 K. B. 776.

thinks best, "always giving a fair opportunity to those who "are parties in the controversy for correcting or contradicting "anything which is prejudicial to their view": per Lord Loreburn in *Board of Education* v. *Rice.* (1)

R. M. Montgomery K.C. in reply.

Cur. adv. vult.

1940. Sept. 19. Clauson L.J. In the unavoidable absence of Scott L.J., I will read his judgment.

Scott L.J.: This appeal is from an order of a Divisional Court, for a certiorari to quash a determination by the assessment committee for the city of Westminster, on an objection by Grosvenor House (Park Lane), Ld. (to which I will refer as "the company") to a provisional valuation list made in regard (inter alia) to Grosvenor House on October 13, 1939, under s. 47 of the Valuation (Metropolis) Act, 1869; also for a mandamus to the assessment committee to hear and determine the said objection. The "determination" which the Divisional Court in fact quashed was under sub-s. 6 of s. 47, which is as follows: "The Committee shall hear and "determine on the objection in the same manner as if it were "an objection to a valuation list, and may make such order "as they think just." The sub-section thus applies the procedure in ss. 6, 7, 11 and 14 of the Act, and the important sections of the Union Assessment Committee Act, 1862, incorporated in s. 7—a curious repetition of the incorporation in s. 1. It was argued before us that s. 47 excludes the sections of the 1862 Act, which were specially included by s. 7. I can see no ground for that argument, the more so as sub-s. 6 of s. 47 applies the "manner" of dealing with valuation lists. Assessment committees in London are now composed as provided by s. 18 (*h*) of the Local Government Act, 1929.

The precise question involved does not seem to have come up previously for judicial decision. A short statement of the material facts will make it clear.

[His Lordship then recited the material facts and continued:]

Before the Divisional Court two main points were made by the respondents' affidavit evidence. The first was that the assessment committee was bound in law to the figures of the two surveyors, and no others. The argument was put on two alternative grounds: (1.) That the assessment committee had invited the respondents' surveyor to agree the figures with the rating authority's surveyor; and had undertaken to accept whatever figures were agreed; and that as the surveyors had in fact agreed, the assessment committee was bound in law to insert the agreed figures in the provisional list. A Mr. Giles, who was a member of the assessment committee, and had been chairman of it at two earlier meetings, when theatres and other hotels had been discussed, in his affidavit denied that any undertaking had been given, and added the opinion that for the assessment committee to give any such undertaking would have been illegal. The alternative ground, (2.) was that no evidence other than the agreed statement of the two surveyors had been before the Committee at the hearing; that there was no evidence to support any other determination; and that, therefore, the committee was obliged in law to act on it. In my opinion there was no substance in either contention. The affidavits of Mr. Giles, Mr. Eaton Smith (who was in the chair on December 6) and Mr. Morris, the clerk to the rating authority, in my view dispose of any basis of fact for the alleged undertaking; the second contention, that the committee was bound by the evidence of the two surveyors, is plainly unfounded in law.

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(1) [1911] A. C. 179, 182.

The company's second point is much more serious. It arises out of a fact stated quite candidly in Mr. Giles' affidavit, where he deals with the grounds on which the Company sought their orders from the King's Bench Division. In answer thereto he stated the material upon which the assessment committee had proceeded to arrive at its conclusion, that whilst there had been some reduction of value within the section, the right figures were 25,800*l.* and 21,497*l.* The material consisted, he said, first of the facts supplied by Mr. Faraday, and of his and the city valuer's arguments; secondly, of "a general report from Mr. Charles Gerald Eve, "P.P.S.I., as to the effect of the war upon the value of various "classes of business premises, including hotels, and as to the "factors producing such effect"; and thirdly, of the expert knowledge and experience of the assessment committee itself.

It was urged, both below and before us, that it was improper for the assessment committee, when acting in a judicial capacity under sub-s. 6, for the purpose of "hearing and "determining" the company's objection, to take into consideration evidence which it did not give the company an opportunity of inspecting, criticizing and answering. Apparently the company had no knowledge of the existence of any such report till the disclosure of the fact in Mr. Giles' affidavit. It does not appear clearly whether that report was obtained by the committee before or after the time of the hearing on December 6. If it had been obtained before that date, I should regard it as merely one of the sources from which the committee had properly obtained its information; for it was the committee's duty, as an expert body, to inform itself; and I should not be prepared to hold that at the hearing the committee came under any duty to disclose that particular source, any more than any other source, of its expert knowledge. Nor was it the duty of the committee to disclose its knowledge as such. The assessment committee, except when performing the quasi-judicial function of determining an objection, either to a provisional list or to a valuation list, is an executive or ministerial body of an expert character, whose function is to make the list on the lines laid down by the relevant legislation; and primarily it is its duty to make itself expert, and to act upon its own expert knowledge; although it is entitled under s. 20 of the Union Assessment Committee Act, 1862, to employ a surveyor, or take "such "other means as they may think necessary for ascertaining "the correctness" of the lists. The express permission to employ a surveyor is given, probably, in order to authorize the necessary expenditure. Even when performing a quasi-judicial function, as on hearing objections, whether to the valuation list proper under s. 19 of the Union Assessment Committee Act, 1862, or to a provisional list under s. 47, sub-s. 6, of the Valuation (Metropolis) Act, 1869, the assessment committee does not sit as a court. Notice of an objection has to be given to the rating authority; but there is no lis inter partes between the objector and the rating authority; no evidence is given in the sense of sworn evidence; there is no process of discovery, with its rules of relevancy to the issue; indeed there is no issue; and the assessment committee has no power to state a case for the High Court. The whole proceeding on objection is informal; as an aid to the performance by the assessment committee of its primary duty, which is ministerial, as in my opinion is indicated by ss. 19, 20 and 21 of the Act of 1862. A similar indication is afforded by other statutory arrangements. Under the Valuation (Metropolis) Act, 1869, appeals from a valuation list are allowed either to special sessions or quarter sessions; and the same provisions apply under s. 46, sub-s. 4, to supplemental lists; but no appeal is given from the determination of an objection by the assessment committee. The purely ministerial nature of the assessment committee's main function is indeed emphasized in the case of provisional lists by the very fact that the ratepayer's ultimate rights are safeguarded by the provision in sub-s. 10 of s. 47, that if the valuation list, in which the alterations of the provisional list are ultimately embodied, is reduced on an appeal against that list, the ratepayer will get a refund of the difference.

This ministerial character of the assessment committee, and the uniformly ministerial nature of its procedure, have been recognized by the House of Lords in a case under s. 1 of the Union Assessment Committee (Amendment) Act, 1864 (which dealt with appeals against a rate), *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (1) That section was repealed for the Metropolis by the Valuation (Metropolis) Act, 1869, and outside the Metropolis by the Rating and Valuation Act, 1925; but the observations of their Lordships upon assessment committees remain unaffected. Lord Finlay said: "In my opinion this Statute "has not the effect of assimilating the procedure before "the assessment committee to a hearing on appeal. The

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(1) [1925] A. C. 309, 325.

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" assessment committee are assumed to have some practical " acquaintance with rating matters and the proceedings before " them are not so formal as on a hearing in Court. All that " the proviso in s. 1 of the Act of 1864 does is to provide " that an opportunity shall be given to the assessment " committee of setting right anything in the list which gives " sufficient ground of complaint before the expense of an " appeal against a rate has been incurred. The form of notice " issued by the assessment committee itself was adopted by " the Colliery Company. I think the form was right, as " notice in general terms of the nature of objection is enough " to satisfy the proviso in s. 1 of the Act of 1864. The " assessment committee are experts and have expert assistance; " and they may be assumed to be capable of appreciating the " real point and seeing what ought to be done, without a more " detailed notice. If there is any obscurity, questions can " be put to the complainant or his representatives. If it had " been intended to impose upon the parties the burden of a " preliminary hearing before the assessment committee, with " all the formalities of legal procedure, this would, I think, " have been prescribed in clear language." Lord Shaw said (1): " The practice has been explained and is familiar. Such " objections are very numerous. They are dealt with in a " practical spirit. In most cases the valuer and the ratepayer " or his representative meet together and endeavour to get " at an agreed figure or to understand each other as to what is " the real difference to be determined by the committee." Lord Carson said (2): " My Lords, I think it is necessary to " remember that the proceedings before the assessment " committee are of a very informal nature, and in no sense " an appeal to a Court. It is merely a proceeding to draw the " attention of the committee, who has already settled the list " under the procedure I have already described, to the complaint " of excessive rating, and to give an opportunity to have, if " possible, the matter arranged by such conferences and " methods as may seem applicable. Indeed, the proceedings " before the Committee in this case, as described in the Case

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(1) [1925] A. C. 309, 329.

(2) Ibid. 334.

" stated, show that there were correspondence and references " to valuers, and after an adjournment the matter seems to " have been decided without further hearing, and that, although " the appellants had asked for a further hearing. That an " objector is not bound to give evidence in support of his " objection, that no oath can be administered, that there are " no rules of evidence, all show that the Committee is in no sense " a Court, and that the proceeding is an informal one with a " view to arresting the attention of the Committee to save, " if possible, the necessity of an appeal. Indeed, I think the " very object of the section would be frustrated if at such a " stage a party was obliged to employ legal advisers as to the " exact points to be raised from fear he might, through any " omission, be deprived of his right of appeal."

For the reasons which I have given I cannot see why an assessment committee should be under any duty to produce, on a hearing under sub-s. 6 of s. 47 of the Act of 1869, a copy of a general report by a surveyor which it has already obtained, even although it may contain some matter relevant to the objection. On the other hand, if after the hearing it obtains such a report, it does seem to me inconsistent with what I can only call a sense of natural fairness, that although it may be really relevant, either because it supports or because it controverts the ratepayer's objection, the assessment committee should not disclose it to the ratepayer's adviser, and give him a chance of dealing with it. On the whole I think it should, in such a case, resume the hearing after due notice. It is because nothing was said or done on these lines in the present case that I take the view that the assessment committee did not give an adequate " hearing." It was its duty to " hear " ; and I do not think that it did " hear." The order for a certiorari was, therefore, right.

While expressing this conclusion, I have thought it right to emphasize the essentially executive and non-judicial character of an assessment committee, except when called upon to " hear " an objection. Then its function becomes quasi-judicial ; but, subject to these observations, I agree with the judgment of my brethren, which I have perused.

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The mandamus should be in reality, as well as in form, limited to the duty of hearing and determining; and it would be wrong to fetter the discretion of the assessment committee any more than if it had disclosed the report and then resumed the hearing. Its duty will still be to arrive, as best it can, at the true reduction in figures due to a "cause" within the section. The order will be as my brethren propose.

CLAUSON L.J. I will ask my brother du Parcq to read the judgment of himself and myself.

DU PARCQ L.J. In our opinion the order of the Divisional Court was right; but, with great respect to the learned judges who composed the Court, we think that some of the reasons given for it were unsound, and ought not to be regarded as a correct statement of the law. The headnote of the report in the Law Reports, which we think correctly summarizes the judgments, states the decision in these words: "*Held*, that the committee were bound to accept the agreed "figures and to determine the case accordingly." If that is indeed an accurate statement of the decision of the Divisional Court, it is important in our view that it should not be allowed to stand as an authority for the future guidance of those whom it may concern.

It is unnecessary to recapitulate the facts of the case, but in order to explain our reasons for agreeing with the order, while differing from the judgments delivered, we must state our opinion as to the duty which the assessment committee had to perform. The committee had to ascertain whether the respondents' hereditament had been "from any cause . . . . "reduced in value"; whether, that is, for any reason which could properly be regarded as a "cause" within s. 47 of the Valuation (Metropolis) Act, 1869, the hypothetical tenant could no longer be expected to pay the full amount of the rent assumed to have been previously payable. The committee was bound "to hear and determine on" the objection, and the use of those words in sub-s. 6 is enough to show that the function which it was exercising was, as Lord Sumner

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said in *London County Council* v. *Islington Assessment Committee* (1) "clearly judicial." This does not mean, of course, that the committee was bound to exercise the judicial function exactly as if it had been a court of law. It could not have done so even if it would, because it has no power to hear sworn evidence. Its duty was to hear the objection in the same manner as if it had been an objection to a valuation list. Some observations in the House of Lords on the manner in which objections were heard, and properly heard, under s. 1 of the Union Assessment Committee Amendment Act, 1864, are of assistance here, because it is, we think, true to say that the manner of hearing objections under that Act did not differ in any material way from the manner of hearing objections under s. 21 of the Union Assessment Committee Act, 1862. We were referred to the speeches of Viscount Finlay and Lord Carson in *Gateshead Assessment Committee* v. *Redheugh Colliery, Ld.* (2) For the present purpose it is enough to say, without full quotation from those speeches, that the proceedings are informal; that the committee is not bound by the rules of evidence followed in courts of justice; and that the committee is assumed itself to have practical acquaintance with rating matters. It must be added that by s. 38 of the Rating and Valuation Act, 1925, the committee was expressly empowered to employ a competent adviser. Finally, it must always be borne in mind that the paramount duty of the assessment committee is to make such order as it thinks just; and that, if it should arrive at too low a figure, other ratepayers will suffer, even if the rating authority does not complain.

We now turn to the question whether the assessment committee has in any respect failed in its duty. In our opinion it was entitled to seek the aid of the "competent "person" whom it did in fact employ. Mr. Giles' affidavit tells us that the committee "had the advantage of a general "report from Mr. Eve as to the effect of the war upon the "value of various classes of business premises, including hotels, "and as to the factors producing such effect." We do not doubt that it is lawful to obtain such a general report under s. 38 of the Rating and Valuation Act, 1925. We were told by Mr. Montgomery that the committee obtained, or at any rate purported to obtain, Mr. Eve's report under that section; and we do not share the difficulty which Humphreys J. felt about accepting that statement. We ought, we think, to assume, in the absence of clear evidence, that the committee was acting in conformity with the law—omnia præsumuntur rite esse acta. We are clearly of opinion, however, that, having obtained the report, the committee was bound to communicate to the rating authority, and to the objectors, such parts of it as were relevant to the inquiry. It is obvious, from the reference to the report in Mr. Giles' affidavit, that at least some parts of it were so relevant. We are well content to adopt and apply to this case the language used by Lord Loreburn with regard to an inquiry by the Board of Education, when he said that the Board must always give "a fair "opportunity to those who are parties in the controversy for "correcting or contradicting any relevant statement prejudicial "to their view." (*Board of Education* v. *Rice.* (1)) Those words may properly be applied, in our opinion, to any inquiry of a judicial character. Mr. Montgomery suggested that Lord Loreburn was referring only to statements of fact, and not to expressions of opinion. For all we know there may have been statements of fact in Mr. Eve's report; but, even if there were not, it can hardly be doubted that expressions of opinion by an expert of acknowledged experience may be as impressive and as damaging as statements of fact.

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(1) [1915] A. C. 762, 782. (2) [1925] A. C. 309, 325, 334, 335.

In our opinion the fact that the committee is entitled to obtain a report for its guidance does not relieve it of the duty of communicating any relevant part of that report to the persons seeking a determination. Indeed, unless a statute expressly provided that such a report should not be communicated to those appearing before the tribunal, we think that we should assume an intention on the part of the Legislature that such communication should be made. It makes no difference, in our opinion, whether the report was

(1) [1911] A. C. 179, 182.

obtained before or after the commencement of the hearing, or that it was of a general and not specific character. The material question is whether it contained matters relevant to the inquiry, and was considered by the committee in relation to the inquiry. If it did contain such matters, and was so considered, then it is ground for complaint that the objectors never had an opportunity of dealing with it. It is as if the representatives of the rating authority and objectors had been requested to leave the room, and Mr. Eve had then been called in to give evidence in their absence.

It is said that as the committee is entitled to use its own knowledge and experience, and is not obliged to state the result of those to the contestants, it must follow that it can enlarge its knowledge by calling in an independent expert without coming under the necessity of revealing his evidence. One answer to this contention, and we think a sufficient answer, is that the experience of an expert tribunal, such as this, is part of its equipment for determining the case. Litigants must take that experience as they find it: and because the tribunal is assumed to be impartial they have no grievance if they cannot test it by cross-examination. An expert witness or adviser, however eminent, is in a very different position. He must not be substituted for the tribunal. Those whose claim is being considered have a right to question and to test every statement he makes, and any opinion he expresses. If that opportunity is denied them, justice is not done. On the ground, therefore, that the committee improperly (though no doubt with the best intentions) considered and gave weight to evidence and, it may be, argument, which was never communicated to the parties most interested, we are of opinion that the respondents are entitled to have the determination of the committee quashed. It follows that mandamus "to hear and determine" must also go.

In every other respect we are of opinion that the assessment committee proceeded in a regular and lawful manner. The Divisional Court appears to have laid it down that, where the rating authority and the objectors are the only persons

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appearing before the assessment committee, any figures upon which these parties agree must be accepted by the assessment committee in the absence of any evidence to the contrary. Moreover, if the view of the Divisional Court were to prevail, there might never be evidence to the contrary. Humphreys J. would permit the committee, if it thought the proposed figure wrong, to ask for further evidence ; but its plea for more evidence may be disregarded, and then it would seem that it must content itself with such evidence as the persons appearing before it are " disposed to offer."

With the greatest respect, we think that this is an erroneous view of the powers and duties of an assessment committee. Even in courts of law it is not a principle of universal application that the Court must give judgment for any sum, or make any order, on which the parties are agreed. We know of no case where the public interest, or, as here, the interest of a considerable section of the public, will be affected by the order, in which the Court is bound, or even entitled, to accept an agreed figure without the slightest investigation or examination. Nor is it true to say, in our view, that any tribunal is necessarily bound to accept evidence which is uncontradicted, or unchallenged, or " all one way." When the particular case of an assessment committee hearing an objection is considered, it seems to us, with respect to those who have thought otherwise, to be impossible to maintain that the figure agreed upon by the persons appearing before it, and supported by their witnesses, must be accepted without question. The committee heard evidence and argument. There is room for argument as to what amounts to a " cause " within the section, a question of law as to which the committee must make up its mind for itself, or with independent legal assistance. Evidence as to a question of English law there never can be, or at any rate there never ought to be. In so far as the evidence dealt with pure fact, for example, the receipts of the respondents' business, there is nothing to suggest that it was not accepted. A great part of the evidence must necessarily have dealt with matters of opinion. The assessment of the rent which a hypothetical tenant will pay is not an exact science. The hypothetical tenant is, after all, only the reasonable man in one of his aspects; and although surveyors may know more than most people about the workings of the tenant's mind, and the effect of such a catastrophe as a great war upon the estate market, they have not a monopoly of wisdom. Even a tribunal inexperienced in rating matters, hearing a statement which is almost inevitably a compound of fact, inference, argument and conjecture, might be excused if it did not accept all the conclusions of the expert. Here, however, we are considering the duty of a tribunal of experts, who may take the view that the two experts whom they have heard are wrong. It is not, we hope, disrespectful to the expert witnesses to say that the committee may possibly be right, and the expert witnesses wrong. If that is granted, it seems to follow that adherence to the doctrine enunciated by the Divisional Court might result in the committee being forced against its will to do injustice to a body of ratepayers. This would be a melancholy result of the issue of a prerogative writ; and it is, we think, important that this Court should make it clear that the committee, while it should hear all relevant evidence and argument in a judicial spirit, must in the end exercise its own judgment according to its own conscience.

We think that the order of the Divisional Court as to costs should not be disturbed. As the assessment committee could not safely omit to appeal to this Court, and its appeal has succeeded in one important particular, though not wholly, we think that the appeal should be dismissed without costs.

Appeal dismissed.

Solicitors for appellants: *Allen & Son.*
Solicitors for respondents: *Richardson, Sadler & Co.*

A. W. G.

K. B. D.
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THE KING *v.* SECRETARY OF STATE FOR HOME AFFAIRS.

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Emergency legislation — Defence of the Realm — Order in Council authorizing detention of any person—If the Secretary of State " has " reasonable cause to believe " that person is member of certain organizations—Belief of Home Secretary founded on confidential reports—Habeas corpus—Necessity of Home Secretary to produce reports—Defence (General) Regulations, 1939, *reg.* 18*B* (1*A*).

The Defence (General) Regulations, 1939, made under the powers conferred by s. 1 of the Emergency Powers (Defence) Act, 1939, provided in reg. 18B (1A) that " if the Secretary of State " has reasonable cause to believe any person to have been or to be " a member of, or to have been or to be active in the furtherance of " the objects of, any such organisation as is hereinafter mentioned, " and that it is necessary to exercise control over him, he may " make an order against that person directing that he be detained."

The Home Secretary made an order for the detention of a person under that regulation as he had reasonable cause to believe that that person was a member of or was active in the furtherance of the objects of a certain organization. In reply to an application for a writ of habeas corpus the Home Secretary swore an affidavit in which he said that before he made the order for detention he received confidential reports and information from persons in responsible positions whose duty it was to make investigation, and that, having considered such reports and information, he had come to the conclusion that there was ground for believing and he did in fact believe that the person detained was a member of and had been active in the furtherance of the objects of the organization :—

Held, that it was not the function of the Court to act as a court of appeal from the discretionary decision which had been made by the Home Secretary and to inquire into the grounds upon which he had come to his belief, and that the Court would not compel him to produce the confidential reports upon which he had come to his belief. The habeas corpus was accordingly refused.

APPLICATION for a writ of habeas corpus.

Sir John Anderson, the Home Secretary on June 18, 1940, made the following order :

" Whereas I have reasonable cause to believe Aubrey " Trevor Oswald Lees to have been or to be a member of or

" to have been or to be active in the furtherance of the objects " of an organisation as respects which I am satisfied—(*a*) that " the persons in control of the organisation have or have had " associations with persons concerned in the government of, " or sympathies with the system of the government of, a " power with which His Majesty is at war, and (*b*) that there " is danger of the utilisation of the organisation for purposes " prejudicial to the public safety, the defence of the realm, " the maintenance of public order, the efficient prosecution " of a war in which His Majesty is engaged or the maintenance " of supplies or services essential to the life of the community.

" Now, therefore, in pursuance of the powers conferred on " me by Regulation 18B (1A) of the Defence (General) " Regulations, 1939, I direct by this my order, that Aubrey " Trevor Oswald Lees shall be detained."

On June 20, the said Aubrey Trevor Oswald Lees was detained under the said order and had since been detained in various prisons.

The said A. T. O. Lees was informed by the Advisory Committee under the Defence Regulation 18B, that the order was made against him for the following reasons :—

1. The Secretary of State has reasonable cause to believe that you have been a member of the organization now known as the " British Union " ; and to have been active in the furtherance of its objects ; and that it is necessary to exercise control over you.

2. The organization known as " British Union " is subject to foreign influence and/or control.

3. That Oswald Ernald Mosley, as one of the persons in control of the organization has or has had associations with persons in the government of Germany, a power with which His Majesty is at war.

4. That the said Oswald Ernald Mosley, as one of the persons in control of British Union, and other persons in such control, have sympathies with the system of government in Germany, a power with which His Majesty is at war.

5. There is danger of the utilisation of the organization known as British Union for purposes prejudicial to the public

safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war in which His Majesty is engaged, or the maintenance of supplies or services essential to the life of the community.

Particulars were given of the first four reasons.

The said A. T. O. Lees applied ex parte for a writ of habeas corpus and in support thereof he on August 9, 1940, swore an affidavit in which he said with regard to the reasons for making the detention order against him.

(*a*) I do not know whether or not the allegations therein made against the former organization called the British Union and against Oswald Ernald Mosley are true or not.

(*b*) I am not a member of the said organization.

(*c*) I have never been a member of the said organization.

(*d*) So far as I have any political views they can best be described as Radical. I have never been a member of any political party. I have never been a member of any organization other than the Colonial Civil Service, the Regular Army Reserve of Officers, the Royal Empire Society, the Central Asian Society, the United Services Club and a Masonic lodge.

(*e*) I have never subscribed to the funds of the British Union or to the funds of any political or other organization except Regimental and Masonic funds and charitable organizations in the east end of London.

(*f*) I have not furnished the British Union with material for propaganda.

(*g*) I have attended a few meetings at which the said Mosley was present but they were certainly not meetings held for any of the purposes suggested in the said document. I only attended the said meetings fortuitously as a political curiosity and on one occasion on the invitation of a friend and on another to meet a friend.

(*h*) I have not propagated anti-British views or endeavoured to hinder the war effort in this country with a view to a fascist revolution, which I should not welcome at all. On the contrary, for some twenty-three years I have been continuously in the service of the Crown, first as an officer in His Majesty's

Regular Army and subsequently in the Colonial Service. So far from endeavouring to hinder the war effort in this country, both before and immediately after the outbreak of war I offered my services in writing to the War Office and followed this up by several applications in person. I only desisted when I was informed by Mr. T. I. K. Lloyd of the Colonial Service that the Secretary of State for the Colonies preferred that the Colonial Civil Servants should remain at their posts. When arrested I was actually awaiting my ship to take up a new post to which I had been appointed on the Gold Coast.

The only suggestions made against me when I attended before the Advisory Committee appeared to be—(*a*) that I was anti-Semitic and had sent to a friend articles expressing such views. I do not like Jews and I think that they have too much power in this country and I admit that I have said so and I admitted it to the said committee; (*b*) that I had written a letter in which I made it plain that I did not like Lord Halifax. I do not like Lord Halifax.

In reply to the affidavit of A. T. O. Lees, Sir John Anderson, the Home Secretary, on August 19, 1940, swore an affidavit para. 3 of which was as follows: "Before I made the said "order I received reports and information from persons in "responsible positions who are experienced in investigating "matters of this kind and whose duty it is to make such "investigations and to report the same to me confidentially. "I carefully studied the reports and considered the information "and I came to the conclusion that there were clear grounds "for believing and I did in fact believe that Mr. Aubrey "Trevor Oswald Lees was a member and was and had been "active in the furtherance of the objects of an organisation "as respects which I was satisfied: (*a*) that the persons in "control of the organisation have or have had associations "with persons concerned in the government of, or sympathies "with the system of the government of a power with which "His Majesty is at war; and (*b*) that there is danger of the "utilisation of the organisation for purposes prejudicial to "the public safety, the defence of the realm, the maintenance "of public order, the efficient prosecution of a war in which

"His Majesty is engaged or the maintenance of supplies or "services essential to the life of the community."

On August 21, 1940, Sir John Anderson swore another affidavit in which he said: "Upon consideration of the reports "and information referred to in paragraph 3 of the said affidavit "sworn on August 19, 1940, I came to the conclusion that in the "national interests it was necessary to exercise control over "the said Aubrey Trevor Oswald Lees and accordingly I made "the order referred to in paragraph 2 of the said affidavit."

Gerald Gardiner and *J. W. Williamson* for the applicant.

Sir William Jowitt S.-G. and *Valentine Holmes* for the Home Secretary.

At the conclusion of the argument on August 22 the Divisional Court intimated that the application would be refused and that they would give their reasons later.

1940. Sept. 9. The judgment of the Court (HUMPHREYS, OLIVER and CROOM-JOHNSON JJ.) was delivered by HUMPHREYS J.

On July 12 an application ex parte was made by Mr. Gerald Gardiner to a Divisional Court for a writ of habeas corpus at the instance of Aubrey Trevor Oswald Lees. It appearing from the affidavit in support that the applicant was detained in Brixton prison by virtue of an order purporting to be made on June 18 by the Home Secretary in pursuance of powers conferred upon him by reg. 18B (1A) of the Defence (General) Regulations, 1939, the Court directed in accordance with r. 16 (*c*) of the Rules of the Supreme Court (Divisional Courts), 1938, that the application be adjourned so that notice might be given to the Home Secretary and the Governor of Brixton prison. On the adjourned hearing of the application on August 22, the Home Secretary was represented by the Solicitor-General. After hearing arguments the Court announced the unanimous decision of its members that the application must be refused. We now proceed to give our reasons for that refusal.

Regulation 18B is one of the regulations made by Order in

Council in accordance with powers conferred by s. 1 of the Emergency Powers (Defence) Act, 1939, and was admitted in the argument before us to have been validly made. Paragraph 1A of that regulation provides that the Secretary of State if he " has reasonable cause to believe any person to " have been or to be a member of, or to have been or to be " active in the furtherance of the objects of, any such organisa- " tion as is hereinafter mentioned, and that it is necessary to " exercise control over him, ... may make an order against " that person directing that he be detained." The organizations mentioned include any organization as respects which the Secretary of State is satisfied that the persons in control of it have had sympathies with the system of government of a power with which His Majesty is at war and that there is danger of the utilisation of the organization for purposes prejudicial to the prosecution of the war. One of such organizations is the British Union, referred to in the argument as the British Union of Fascists, in regard to which an order has been made by the Secretary of State applying to it reg. 18AA (*a*), enabling the organization, in certain circumstances, to be controlled or wound up. It is material to note that reg. 18B provides for the suspension by the Secretary of State of any order of detention made by him, with or without conditions as to residence, travelling and so forth, and further provides for the creation of advisory committees to which any person aggrieved by the making of or by the refusal to suspend any order may make his objection. The Secretary of State is required to make a monthly report to Parliament as to the number of cases, if any, in which he has declined to follow the advice of any such advisory committee.

It would appear from the affidavit of the applicant that he has made objection to an advisory committee, and that his objection has been heard. It further appears from a document exhibited to the said affidavit, and marked A.T.O.L.2, that the applicant was furnished for the purposes of that hearing with the reasons, stated in some detail, for the order which had been made against him. This document was no doubt served upon the applicant in compliance with para. 5 of reg. 18B (1B).

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The first ground of objection to the order is that it was and is bad upon the face of it. That part of the order which is material upon this point reads as follows: " Whereas I have " reasonable cause to believe Aubrey Trevor Oswald Lees to " have been or to be a member of or to have been or to be active " in the furtherance of the objects of an organisation," etc.

The order, therefore, follows strictly the language of the regulation. It is argued that the order is bad for duplicity in that the two allegations of membership of and activity in connection with the objects of the organization are stated in the alternative. It is said that they afford separate grounds for the making of an order and that one or other or both of those grounds of belief should appear as the reason for making the order. In our opinion there is nothing in the point. The document in question is not a conviction nor an indictment nor even a charge. Grammatically, it may be perfectly correct to say that the Home Secretary had reasonable cause to believe that the applicant was either a member of or was active in the furtherance of the objects of the association so as to justify the making of the order. It might, with equal force, be urged that the words " to have been or to be " render the order bad upon the face of it.

We find nothing in the statute or the regulations requiring that the order should be in any particular form and, in our judgment, the order is not invalid upon this ground.

The next and only other point taken was that the order is invalid because the Home Secretary never had any reasonable cause to believe that the applicant was a person to whom the regulation applied. Now the Court entertains no doubt that upon an application for a writ of habeas corpus the Court has power to inquire into the validity of the order of detention, and for that purpose to ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order. So much was frankly admitted by the Solicitor-General who, however, strongly contested the proposition advanced on behalf of the applicant that the Court is bound to have before it all the material upon which the belief of the Home Secretary was based—in order to arrive at a decision whether there was reasonable cause for the belief which the Home Secretary has expressed. The Secretary of State is bound, in such a case, to act, if at all, upon information supplied to him by others. Such information is necessarily confidential. The disclosure to the applicant and to the public of such confidential information, together with the identity of the informants, might well be highly prejudicial to the interests of the State. Moreover, a Divisional Court sitting to hear and determine an application for a writ of habeas corpus does not sit as an appellate Court. It is not for us to determine whether, in our opinion, the applicant ought to be interned; we are concerned only to inquire into the legality of his detention. In this connection a passage from the speech of Lord Finlay L.C. in the case of *Rex* v. *Halliday* (1) may usefully be quoted. The decision in that case turned upon the validity of a regulation, 14B, of the Defence of the Realm Regulations, 1914, framed in somewhat different terms from the present, but the Lord Chancellor observed as follows: "The measure is not punitive but precautionary. It was "strongly urged that no such restraint should be imposed "except as the result of a judicial inquiry . . . . It seems "obvious that no tribunal for investigating the question "whether circumstances of suspicion exist warranting some re-"straint can be imagined less appropriate than a Court of Law."

That expression of opinion appears to us appropriate to the present case and we respectfully agree with and adopt it. How then is a Court to decide the question whether the Secretary of State had reasonable suspicion for his belief? In our opinion no general rule can be laid down and each case must be decided upon its own facts. In the present case we have read and considered the statements made in the affidavit of the applicant. We have also before us an affidavit made by Sir John Anderson, the Home Secretary, in para. 3 of which the deponent states as follows: "Before I made "the said order I received reports and information from "persons in responsible positions who are experienced in "investigating matters of this kind and whose duty it is to

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(1) [1917] A. C. 260, 269.

"make such investigations and to report the same to me "confidentially. I carefully studied the reports and considered "the information and I came to the conclusion that there were "clear grounds for believing and I did in fact believe that "Mr. Aubrey Trevor Oswald Lees was a member and was and "had been active in the furtherance of the objects of an "organisation as respects which I was satisfied: (*a*) that the "persons in control of the organisation have or have had "associations with persons concerned in the government of, "or sympathies with the system of government of, a power "with which His Majesty is at war, and (*b*) that there is danger "of the utilisation of the organisation for purposes prejudicial "to the public safety, the defence of the realm, the maintenance "of public order, the efficient prosecution of a war in which "His Majesty is engaged or the maintenance of supplies or "services essential to the life of the community."

We accept those statements made upon oath by Sir John Anderson and, accepting them, we are satisfied that he had reasonable cause for believing that the applicant was a person to whom the reg. 18B (1A) applied. The application is dismissed.

Application dismissed.

The applicant appealed. The appeal was heard on October 2, 1940.

In the meantime the Home Secretary considered the case again in the light of the advisory committee's report, and decided to revoke the order for detention and to issue instructions for the applicant's release. The applicant was accordingly released on September 27. The Home Secretary made a fresh order against the applicant under reg. 18A of the Defence (General) Regulations, 1939, imposing restrictions upon the applicant's residence and change of residence.

When the appeal came on for hearing on October 2, Mr. Gerald Gardiner for the appellant intimated that in view of the appellant's release, he did not wish to pursue the appeal provided he was given the costs of the appeal. The Solicitor-General opposed the application of the appellant for the costs of the appeal and said that if the appeal was abandoned it ought to be dismissed with costs. Thereupon the appeal was argued upon its merits.

Gerald Gardiner and *J. W. Williamson* for the appellant. The order for detention is bad upon the face of it for duplicity in that it was impossible to tell whether it was made upon the ground that the Home Secretary had reasonable cause to believe that the appellant had been or was a member of an organization of the kind referred to in the order, or on the ground that he had reasonable cause to believe that the appellant had been or was active in the furtherance of the objects of such an organization. The order was also bad for ambiguity. The order was also bad because the Home Secretary never had reasonable or any cause for believing that the appellant had been or was a member of the British Union, or had been or was active in the furtherance of its objects. The appellant had sworn an affidavit that he was not a member of that organization. The Home Secretary has merely said in answer that he had received confidential reports from persons in responsible positions who were experienced in investigating matters of this kind, and that on reading those reports he came to the conclusion that there were clear grounds for believing that the appellant Lees was a member of the organization. The Home Secretary ought to have produced those reports in order that the Court might decide whether the Home Secretary had reasonable cause for his belief so as to justify him in making the order.

[GODDARD L.J. If the Home Secretary says that he has reasonable cause for making a detention order and that the grounds of his belief are founded on confidential reports, can the Court inquire into the reasonableness of the grounds for his belief ?]

Yes. Otherwise the Home Secretary will be judge in his own cause. Lord Wrenbury said in *Rex* v. *Halliday* (1): " If his case were that he had neither hostile origin nor associa-" tions he could have his writ of habeas corpus on the ground

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(1) [1917] A. C. 308.

"that that was so, and if he established the fact he would be "discharged." In the present case the appellant has established that fact and therefore the detention order was wrongly made against him.

Sir William Jowitt S.-G. and *Valentine Holmes* for the respondent.

MacKinnon L.J. This is an appeal from a judgment of the Divisional Court on an application to it for a writ of habeas corpus by Mr. Lees the applicant. The Court apparently directed that notice of that application should be given to the Governor of Brixton Prison, where he was detained, and to the Home Secretary, and dealt with the matter upon material consisting of an affidavit by the applicant and two exhibits and two affidavits by the Home Secretary. The result was that the application for the writ was refused by the Divisional Court. This is an appeal from that refusal, but the scope of the appeal has become very limited and almost a matter of only academic interest, because the liberty of the applicant since the hearing in the Divisional Court has been secured. He has been released from detention under certain conditions imposed by a subsequent order of the Home Secretary. As a result of that conditional release Mr. Gardiner this morning said he did not desire to pursue the appeal provided that he was given the costs of the appeal, and suggested that he was entitled to those costs because his object, the freeing of the applicant from custody, has been achieved by the action of the respondent, and therefore he had in substance won the fight. The Solicitor-General for the Crown not only opposed that application for any costs of the appeal by the applicant, but asked that if the appeal was abandoned as Mr. Gardiner proposed to abandon it, the order of this Court should be one dismissing the appeal with costs. Of course, the question who should pay the costs of the appeal involved consideration of the merits of the appeal itself, and upon that aspect of the matter Mr. Gardiner desired to argue the appeal, and has accordingly done so, although as I have said, it has now only an academic interest in that the object, the enlargement of the applicant from custody, has been permitted by other means. I should be almost content to say that I agree with everything that was said in the very careful judgment of the Divisional Court delivered by Humphreys J., which seems to me to cover all the ground and to be manifestly correct. So far as the Home Secretary is concerned, he is empowered by reg. 18B (1A) in these terms: "If the Secretary of State has reasonable cause to believe "any person to have been or to be a member of, or to have "been or to be active in the furtherance of the objects of, "any such organisation as is hereinafter mentioned, and that "it is necessary to exercise control over him, he may make "an order against that person directing that he be detained"—and then there is a description of the organizations. The order made by the Secretary of State followed precisely the terms of the regulation: "Whereas I have reasonable cause "to believe Aubrey Trevor Oswald Lees" (the applicant) "to have been or to be a member of, or to have been or to be "active in the furtherance of the objects of, an organisation "as respects which I am satisfied"—then the terms of the regulation follow. "Now, therefore, in pursuance of the "powers conferred on me by Regulation 18B (1A) of the "Defence (General) Regulations, 1939, I direct, by this my "order, that Aubrey Trevor Oswald Lees shall be detained." It is, I think, obvious from the terms of that regulation that if the Home Secretary honestly believes, or has reasonable cause to believe, that a person is within this category he is authorized to make an order for his detention, and that makes his detention legal and not subject to review or inquiry under the Habeas Corpus Act, 1816. The sole question is whether the Secretary of State had reasonable cause to believe and did honestly believe. The Secretary of State has by affidavit sworn that he received a number of reports from persons whom he regards as reliable in regard to this man, "persons in responsible positions who are experienced "in investigating matters of this kind and whose duty it is "to make such investigations and to report the same to me "confidentially. I carefully studied the reports and considered "the information and I came to the conclusion that there were "clear grounds for believing and I did in fact believe that "Mr. Aubrey Trevor Oswald Lees was a member and was and "had been active in the furtherance of the objects of" the organization. Mr. Gardiner says that the Home Secretary does not bring before the Court what was the nature of those reports, and as he has not done so the Court ought to hold that he has not satisfied it that he had reasonable cause to believe, as he has sworn that he had. That seems to me to suggest that in every case of this sort this Court can be made to act as a court of appeal from the discretion of the Secretary of State and inquire into the grounds upon which he has come to the belief, and can consider whether there were any such grounds for belief, or, if there were any grounds, whether it was a reasonable belief. I do not think it is the function of the Divisional Court or this Court in any way to act as a court of appeal from the discretionary decision which has to be made by the Secretary of State. He has sworn that he had grounds in the nature of those reports which were confidential and that he did come to the conclusion that there were clear grounds for believing and did in fact believe. I have his affidavit and I have no reason to think that it was otherwise than strictly honest and correct. Therefore, he has proved to my satisfaction that he had reasonable cause to believe and did honestly believe, in the terms of the regulation, and that being so, the order was validly issued pursuant to this regulation, and if the writ were directed to the gaoler at Brixton Prison it would be his complete and sufficient answer to the writ and justification for the detention of the applicant. As I have said, the question now is not whether the applicant can get an order for his release but whether he should pay the costs of this appeal. Having regard to my view as to the merits of the appeal, I think that the Solicitor-General is justified in asking us to dismiss the appeal with costs, and I think that that should be the order of this Court.

Goddard L.J. I agree.

DU PARCQ L.J. I also agree.

Appeal dismissed with costs.

REX
v.
SECRETARY OF STATE FOR HOME AFFAIRS.
LEES, *Ex parte.*

Solicitors for appellant : *Oswald Hickson, Collier & Co.*
Solicitor for respondent : *Treasury Solicitor.*

R. F. S.

1940
Oct. 29.

ROWLEY *v.* EVERTON (T. A.) & SONS, LIMITED.

Mine—Quarry—Offence—Failure to keep dangerous machinery, etc., securely fenced—Time of commission of offence—Quarries General Regulations, 1938 (*St. R. & O.*, 1938, *No.* 632), *reg.* 14 (1.), (2.), (3.) ; *Metalliferous Mines Regulation Act,* 1872 (35 & 36 *Vict. c.* 77), *s.* 34, *sub-s.* 1.

On January 25 and 29, 1940, informations were preferred before justices by an inspector of mines against the owners of a quarry, charging them with offences under reg. 14 (1.), (2.), and (3.) of the Quarries General Regulations, 1938, in failing, on October 31 and December 22, 1939, securely to fence certain dangerous machinery and plant. All the machinery and plant in question had been first worked on or before August 29, 1939 :—

Held, that the dates on which the matters of the informations arose were October 31 and December 22, 1939, and not August 29, 1939, so that the informations were laid within three months from the time when the matters of those informations arose within s. 34, sub-s. 1, of the Metalliferous Mines Act, 1872, and were, therefore, not out of time.

Hull v. *London County Council* [1901] 1 K. B. 580, discussed, and dictum of Bruce J., at p. 589, criticized.

CASE stated by justices.

At a court of summary jurisdiction sitting at Stourport-on-Severn, Worcestershire, on January 25 and 29, 1940, five informations were preferred by the appellant, Elijah Rowley, a divisional inspector of mines, against the respondents, T. A. Everton & Sons, Ld., for that they on October 31 and December 22, 1939, being the owners of a quarry, known as Stour Hill Quarry, unlawfully failed to comply with reg. 14 (1.), (2.) and (3.), of the Quarries General Regulations, 1938 (1), in that they failed securely to fence certain dangerous parts of machinery, the top of a Keen sand hopper, and a crusher platform, where dangerous, and to provide a continuous skirting board on the platform.

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(1) By the Quarries General Regulations, 1938, reg. 14 : " (1.) . . . . " all exposed and dangerous parts " of machinery shall be kept " securely fenced. (2.) . . . . as far " as reasonably practicable . . . . " the top of every hopper and kiln " shall be kept securely fenced. " (3.) All . . . . platforms . . . . " where dangerous, shall be securely fenced on each open side and " shall have on each such side a " continuous skirting board not " less then six inches deep . . . . "

These regulations are " special " rules " under s. 24 of the Metalliferous Mines Regulation Act, 1872, s. 34, sub-s. 1 of which provides : " Any complaint or " information made or laid in " pursuance of this Act shall be " made or laid within three months " from the time when the matter " of such complaint or information " respectively arose."

It was proved or admitted that all the machinery and plant installed or used in the quarry at any material time had been installed and first worked on various dates between November 12, 1938, and August 29, 1939.

The respondents took the preliminary objection that each of the informations was bad and the proceedings in respect of the alleged offences were statute-barred by reason of the provisions of s. 34, sub-s. 1, of the Metalliferous Mines Regulation Act, 1872, on the ground that the "matters" of the informations within the meaning of that sub-section arose when the machinery and plant were first operated, namely, not later than August 29, 1939, more than three months before the informations were laid. On behalf of the appellant it was contended that the "matters" of the informations within the meaning of s. 34, sub-s. 1, were the specific offences charged therein and that they arose on the dates of those offences, so that the informations were preferred within three months of the offences charged and the proceedings were not statute-barred.

The justices upheld the preliminary objection and dismissed the informations. The inspector appealed.

Valentine Holmes for appellant. The magistrates were wrong. The proceedings were not out of time. The dates to be regarded for the purpose of s. 34, sub-s. 1, of the Metalliferous Mines Regulation Act, 1872, as being the times when the matters of the informations arose, are those specified in the informations as the dates of the offences charged, namely, October 31 and December 22, 1939, both of which were within three months of the dates when the informations were preferred. If the contention of the respondents be right, any quarry owner who succeeded in evading the law for three months would obtain perpetual immunity from prosecution, a result of the sub-section which Parliament never could have intended. An offence is committed on every day when the machinery is not securely fenced.

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& SONS, LD.

Gerald Gardiner for respondents. The material date must be taken to be, at the latest, August 29, 1939, when the machinery was first operated. The same considerations apply here as led to the decisions in *London County Council* v. *Cross* (1); *Hull* v. *London County Council* (2); and *Marshall* v. *Smith.* (3)

LORD CALDECOTE C.J. In the view which I have formed in the case the informations appear to me to have been laid within three months from the time when the matters of those informations arose. I base my opinion on the short ground that the offences charged, which were the matters of the informations, were that the machinery in question and the top of the sand hopper were not kept securely fenced and that the crusher platform was not securely fenced and had no skirting board on the days specified in the informations. I am quite unable to accept the contention that, because the machinery had not been kept, or had not been, securely fenced over a certain period, which was more than three months before the dates of the informations, the matters of the informations arose more than three months before the dates of the informations.

The only possible difficulty is due to the cases to which we have been referred, but, on examination of those authorities, I see nothing in them to affect the view which I have expressed. In *London County Council* v. *Cross* (1) the offence charged was that the defendant had erected a building outside the building line. It is quite clear that the Court was right in the conclusion at which it arrived, namely, that the matter of the information arose when the building was erected. In *Hull* v. *London County Council* (2), where the charge was one of extending a projection beyond the general line of buildings in a London street, the Court thought that no offence had been committed, but Bruce J. went on to say (4): "Further, as to "the point raised by the case whether the prosecution of "the alleged offence is barred under s. 11 of the Summary

(1) (1892) 66 L. T. 731.
(2) [1901] 1 K. B. 580.
(3) (1873) L. R. 8 C. P. 416.
(4) [1901] 1 K. B. 580, 589.

"Jurisdiction Act, 1848, by lapse of time, we think it is. If any "offence was committed it was, we think, complete on June 20, "1899—the date on which the said sign was completely "affixed to the premises." That was the decision which the Court apparently would have given if it had thought that an offence had been committed under the section under which the information was laid, but in view of the decision that no offence had been committed the matter did not arise. I feel bound to say that if that expression of opinion had been necessary to decide *Hull* v. *London County Council* (1), I should have found great difficulty in agreeing with it, but it seems not to be binding on us even if that case is on all fours with the present. In *Marshall* v. *Smith* (2) the bye-law under which the appellant was charged was that "the external walls of "every new building . . . . shall be of the following minimum "thickness." It was further provided that: "in case any "offence under any of the foregoing bye-laws shall continue, "the person offending shall be liable to a further penalty of "not exceeding 40s. for each day during which such offence "shall continue after written notice of the offence has been "given by the local board to the offender." Construing the bye-laws under which the charge was brought, the Court was of opinion that the offence was that the appellant had built the wall of less than the minimum thickness and that it was not a continuing offence, so that the matter of the information arose, if at all, more than six months before the date of the information.

In my view, these cases do not require us to come to any conclusion other than that which I am clearly of opinion is right. I think that the magistrates came to a wrong decision and that the case should be remitted to them for determination on that basis.

HAWKE J. I agree.

HUMPHREYS J. I am of the same opinion. The argument of Mr. Gardiner was certainly a startling one. The offences charged in these informations were the failure to comply with regulations which require that certain dangerous machinery, platforms and other named matters shall be kept securely fenced. It was alleged against the respondents that on the days mentioned in the informations they had failed to keep that dangerous machinery, etc., securely fenced. Mr. Gardiner argues that the matter is statute-barred because the respondents had been committing the offence on previous occasions over a period of six months. I agree with Mr. Valentine Holmes that, if that is the true position, the sooner the law is altered the better, because it would be a perfect farce. But I do not think that that is the law, or ever was the law. I do not think it is in the least the meaning of the Summary Jurisdiction Act, 1848, s. 11, which contains the same provisions as the section with which we are dealing here, namely, that an information must be laid within a specified period after the matter of such information arose.

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(1) [1901] 1 K. B. 580.

(2) L. R. 8 C. P. 416.

I am glad to find that the decision which I have expressed does not, in my opinion, conflict with any of the previous decisions of this Court. In *London County Council* v. *Cross* (1), as my Lord has pointed out, the whole point was whether a person who had erected a building contrary to a certain Act of Parliament had committed an offence for which he could be prosecuted more than six months after the date when he had so erected the building. The answer was "No," because the Summary Jurisdiction Act, 1848, requires that the matter of the complaint must have arisen within the previous six months, and in that case, the whole offence being the erection of the building, the matter of the complaint had not so arisen. I am not sure that it is necessary to express any opinion whether *Hull* v. *London County Council* (2) would have been decided to-day in the same way as that in which it was decided in 1901. In the London Building Act, 1894, there is a provision that "no projection from any building shall extend beyond the "general line of buildings in any street." The appellant was said to have offended against that since he was responsible for a projection which extended beyond the general line of buildings, the form of the information against him being that he did on a named day extend a projection beyond the general line of buildings. The case really turned on quite a different point, but if anything was decided which is germane to the matter now at issue it was that it could not be said that the appellant had extended the projection beyond the building line on the day specified in the information because the extension had taken place six months previously when he had first affixed the projection to the building. I do not, therefore, think that that decision is in conflict with the decision in the present case. Nor do I think that *Marshall* v. *Smith* (1) assists us in the least in the decision of this matter.

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(1) 66 L. T. 731.

(2) [1901] 1 K. B. 580.

Appeal allowed.

Solicitor for appellant: *Solicitor, Board of Trade.*

Solicitors for respondents: *Lumley & Lumley, for Holyoake & Foster, Droitwich.*

(1) L. R. 8 C. P. 416.

G. F. L. B.

1940
Oct. 23, 24.

WOOD *v.* OWEN.

Revenue—Income tax—Assessment on executor—Testator exempt from tax—Executor not entitled to exemption attached to testator—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 2—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D*, 1 (*b*).

A testator, who had been resident abroad and had on that ground obtained exemption from British income tax, was entitled during his life to the interest on securities which were subject to certain settlements. After the death of the testator the trustees of the settlements received interest from the securities, and they apportioned the sum received between the estate of the testator and themselves as trustees. The executor of the testator, who received the sum apportioned to the estate, was resident in the United Kingdom, and he was assessed to income tax under Sch. D, 1 (*b*), of the Income Tax Act, 1918, in respect of the sum received by him:—

Held, that the executor was not entitled to take advantage of the exemption from tax which attached to the testator, and he was, therefore, rightly assessed.

Inland Revenue Commissioners v. *Henderson's Executors* 1931 S. C. 681; 16 Tax Cas. 282, applied.

CASE stated by General Commissioners of Income Tax.

At a meeting of the General Commissioners of Income Tax for the Thingoe division of Suffolk on September 21, 1939, the appellant, John Arthur Haig Wood, as executor of James St. Vincent, Baron de Saumarez, who died on April 25, 1937, appealed against an assessment made on him under Sch. D to the Income Tax Act, 1918, by the Commissioners of Income Tax for the year 1937–1938 in the sum of 535*l*. 13*s*. 9*d*. in respect of interest, amounting to 2142*l*. 15*s*., on certain Government stocks.

Lord de Saumarez was resident in Guernsey, where he died, and not in the United Kingdom, and probate of his will was granted by the Ecclesiastical Court of the Bailiwick of Guernsey to the appellant, who was resident in the United Kingdom. Lord de Saumarez was entitled for life to the income of certain securities which were subject to (*a*) a settlement dated October 9, 1882, made on his marriage, and (*b*) a title settlement dated March 21, 1912. The securities in question were British and Dominion Government stocks, the interest on which was payable half-yearly, on January 1 and July 1, May 1 and November 1, and June 1 and December 1, as the case might be. At all material times the trustees of both the settlements were resident and domiciled in Guernsey. During his life Lord de Saumarez had obtained exemption from British income tax on the ground that he was not resident in the United Kingdom.

After the death of Lord de Saumarez the trustees of the settlements received interest from the securities subject to the settlements amounting to 3141*l.* 7*s.* 8*d.*, and they apportioned those amounts as follows: 2142*l.* 15*s.* to the estate of Lord de Saumarez and 998*l.* 12*s.* 8*d.* to themselves as trustees of the settlements. The interest was paid to the trustees without deduction of British income tax and no income tax was deducted by the trustees on paying the appellant the 2142*l.* 15*s.*

The appellant appealed against the assessment on grounds set out by him in a letter to the respondent, the inspector of taxes, as follows: " The interest was receivable by and was " paid to the trustees of the late Lord de Saumarez' title and " marriage settlements who are both domiciled and resident " in Guernsey, and the liability (if any) for British income tax " is theirs. I am not one of the trustees aforesaid, but only " the late Lord de Saumarez' executor."

The Commissioners held that the appellant, as the executor of Lord de Saumarez, was legally entitled to the income the subject of the assessment; that in fact he had received that income; that he was resident in the United Kingdom; and, therefore, that he was assessable to income tax in respect of the income under Sch. D to the Income Tax Act, 1918. They, accordingly, confirmed the assessment, and the appellant appealed.

Heyworth Talbot for appellant.

Sir Donald Somervell A.-G., *J. H. Stamp* and *R. P. Hills* for respondent.

LAWRENCE J. In this case the question is whether the executor of Lord de Saumarez is liable to income tax in respect of certain sums which have been paid to him by the

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Lawrence J.

trustees of settlements under which Lord de Saumarez in his lifetime was a life tenant. The Commissioners have held that the executor is liable to income tax on the sums so received by him. The question whether under the law of Guernsey this apportionment was properly made, was not gone into, and it was assumed that the law of Guernsey for the purposes of this case was the same as the law of England.

I am of opinion that I am bound by *Inland Revenue Commissioners* v. *Henderson's Executors* (1) to hold that the appellant cannot succeed. There a Mrs. Henderson, whose total income did not reach the income tax limit, and who was, therefore, entitled to reclaim income tax on the amount of her income, died, and, after an apportionment under the Apportionment Act, interest on securities was paid to her executor after deduction of tax. When the executor claimed to recover the tax so deducted the Court of Session held that the Apportionment Act had not the effect for income tax purposes of entitling the executor so to reclaim. In my view, the principle of that case is decisive of the present one. It appears to me that the executor here cannot claim to enjoy the exemption from income tax which his testator enjoyed any more than the executor in *Inland Revenue Commissioners* v. *Henderson's Executors* (1) could enjoy the right which his testatrix enjoyed of being entitled to reclaim because her income was not up to the taxable limit. The executor in the present case has undoubtedly received the money, and, unless he is entitled to take advantage of the exemption which attached to his testator, he is liable for income tax on the sum which he has received. I was referred to *Corbett* v. *Inland Revenue Commissioners* (2) and the authorities there cited, from which it is clear that any sums which the executor receives during the course of his administration are his income and no one else's.

I confess that I should have thought that it might be argued that the provisions of r. 18 of the All Schedules Rules would have produced a different result, and that it might be

(1) [1931] S. C. 681; 16 Tax Cas. 282.
(2) [1938] 1 K. B. 567; 21 Tax Cas. 449.

said that the assessment in respect of profits or gains which accrued before the death of the testator could only be made where the testator was chargeable to tax. I should have thought that it might have been said that the interest in this case did, by the doctrine of apportionment, or by the Apportionment Act, accrue within the meaning of that rule to the testator. But that was not the view of the Court of Session, and I, therefore, feel myself bound by the decision in *Inland Revenue Commissioners* v. *Henderson's Executors* (1) to hold that the appellant is not entitled to claim any exemption from tax, but, having received the income, he is bound to pay income tax on it.

I am not sure that I fully appreciated the whole significance of Mr. Talbot's argument, but he argued, among other things, that the result of the apportionment was in some way to convert the interest which was paid to the executor from income into something in the nature of capital, what he called compensation for not enjoying the income, the suggestion being, I suppose, that, because the interest had not been paid to Lord de Saumarez, he and his executor were entitled to compensation for his not having enjoyed that income, so that the character of the interest is altered from income to capital and that prevents it either being income of the executor or of any one else except the trustees who, at the relevant time, were resident in Guernsey. In my opinion, however, there is nothing in the Apportionment Act or in the doctrine of apportionment which changes the nature of the sums which are apportioned, at any rate for income tax purposes. It seems to me that these sums were the income of the executor, and that, in view of the decisions to which I have referred, I must hold that the executor cannot claim to enjoy the exemption which attached to Lord de Saumarez. For these reasons, the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Farrer & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

G. F. L. B.

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(1) [1931] S. C. 681; 16 Tax Cas. 282.

1940
Oct. 28.

McVITTIE *v.* RENNISON.

Justices—Quarter sessions—Dismissal of appeal—Order that appellant pay respondent's costs to be taxed—Validity—Complaint claiming payment of costs—Limitation of time within which complaint must be made—Time to run from date when taxation completed—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

An order by quarter sessions, on dismissing an appeal, that the appellant shall pay the respondent's costs, to be taxed, is valid. It is not necessary that the Court should specify the amount of the costs in order that proceedings may be brought to recover them.

By s. 11 of the Summary Jurisdiction (No. 2) Act, 1848, a complaint claiming such unpaid costs must be made "within six "calendar months from the time when the matter of such complaint "arose." That period begins to run from the date when the taxation of costs is completed, and not from the date of the order directing payment of costs.

APPEAL, by way of Case stated, from a decision of justices.

At a court of summary jurisdiction sitting at Bolton a complaint was preferred by the respondent, Philip Sydney Rennison, the Town Clerk of Bolton, under s. 5, sub-s. 2, of the Summary Jurisdiction (Appeals) Act, 1933, s. 35 of the Summary Jurisdiction Act, 1879, and the Summary Jurisdiction Rules, 1915, against the appellant, Millar Johnstone McVittie, of Half Edge Lane, Eccles, claiming 86*l.* 0s. 6*d.* as being due to the respondent in the following circumstances, which were proved or admitted before the justices.

On May 7, 1938, Bolton Quarter Sessions dismissed an appeal by McVittie from a decision of the Bolton justices, and ordered him to pay the respondent's costs of the appeal, to be taxed by the Deputy Clerk of the Peace. On May 31 those costs were taxed and allowed by the Deputy Clerk of the Peace at 86*l.* 0s. 6*d.*

On May 30, 1939, the Divisional Court (1) discharged a rule nisi for certiorari directed against the order of quarter sessions dismissing McVittie's appeal. On November 10, 1939, the Court of Appeal (2) dismissed an appeal from the decision of the Divisional Court. The 86*l.* 0s. 6*d.* remained unpaid by the appellant.

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(1) [1939] 2 K. B. 98.

(2) [1940] 1 K. B. 290.

At the hearing of the complaint it was contended on behalf of the appellant that the complaint was not made within six calendar months from the time when the matter of complaint arose, as required by s. 11 of the Summary Jurisdiction (No. 2) Act, 1848; that the order of May 7, 1938, was bad in law because it did not specify the amount of the costs in question, and did not show that the Court had ascertained what reasonable costs the respondent had incurred; that the appellant was not estopped by the proceedings and judgments in the Supreme Court from challenging the validity of the order of May 7; and that the justices had jurisdiction to decide whether or not that order was valid, and should dismiss the complaint.

For the respondent it was contended that the date on which the matter of complaint arose and time began to run under s. 11 of the Act of 1848 was June 8, 1938, as the respondent was not able to take any steps to recover the amount due until that date, and the summons issued on November 18, 1938, was accordingly within the period of six months specified by the section; that the order of quarter sessions of May 7, 1938, was valid on its merits, but that it was in any event not competent for the appellant to challenge it because it had been confirmed by the judgments of the Divisional Court and the Court of Appeal.

The justices were referred to *Labalmondière* v. *Addison* (1); *Jacomb* v. *Dodgson* (2); *Sellwood* v. *Mount* (3); and *Midland Railway Co.* v. *Guardians of Edmonton Union.* (4)

The justices were of opinion that the matter of complaint could not arise until the amount of the sum due was known; that the earliest date from which the period of six months could run was, therefore, May 31, the date of the taxation, so that a summons issued on November 18, 1938, was in time; and that they could not question the validity of the order since it had been affirmed as good by the Court of

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(1) (1858) 1 El. & El. 41.
(2) (1863) 3 B. & S. 461.
(3) (1841) 1 Q. B. 726.
(4) [1895] 1 Q. B. 357.

Appeal. They therefore ordered that the appellant should pay the 86*l.* 0s. 6*d.* claimed.

The appellant appealed.

B. H. Waddy for the appellant.

Comyns Carr K.C. and *F. J. Sandbach* (for *W. G. Morris*, on war service) for the respondent.

The arguments for the appellant sufficiently appear from the case. Counsel for the respondent were not called upon by the Court.

Lord Caldecote C.J. [stated the facts, and continued:] The first question to be decided is whether an order for costs must specify the amount of them to enable proceedings to be taken to recover them. Mr. Waddy, for the appellant, agrees that the point is a technical one, and in my opinion it is a bad point. The practice of making orders for costs in this form is of long-standing and a good one. Such an order is open to no possible objection. The parties merely agree that the quantum of the costs shall be fixed by taxation later. The second contention of the appellant is that the proceedings which have been taken on the order of May 7, 1938, made by quarter sessions, are out of time, because the complaint was not made within six calendar months from the date when the matter of complaint arose, the order that the appellant should pay the respondent's costs of the appeal having been made on May 7, and the complaint not having been made until November 18. If, however, the "matter of complaint" arose on May 31, which is the date on which the taxation was completed, then the complaint was made within the prescribed period of six months. The whole question appears to me to turn on the terms of the Summary Jurisdiction (No. 2) Act, 1848. When did the "matter of such complaint" arise? Clearly, in my opinion, it arose when the taxation was completed and the sum of 86*l.* 0s. 6*d.* was found to be the amount due. Up to that time the appellant was not in default. When the course of the taxation was completed he became in default. The decision of the justices was correct in law and the appeal should be dismissed.

HAWKE and HUMPHREYS JJ. concurred.

Appeal dismissed.

Solicitors for appellant : *Percy H. Barker & Co., Manchester.*
Solicitors for respondent : *Simmons & Simmons.*

A. W. G.

C. A.
1940
Nov. 5.

COLE *v.* UNITED DAIRIES (LONDON), LIMITED.

Workmen's compensation—Injury by accident—Payment of compensation—Return to different work—Disfigurement—Incapacity for previous occupation—Declaration of liability—Evidence—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9.

When a workman as the result of an injury sustained in the course of his employment is permanently disfigured, and in the course of the proceedings brought for a declaration of liability uncontradicted evidence is given that the disfigurement will prejudice his chance of obtaining work in that employment, the arbitrator is bound to act upon that evidence and is not entitled to set against it his own observation of the nature of the injury.

It is no bar to the claim for a declaration of liability that the incapacity is due to disfigurement and not to physical inability to work, or that the applicant has the right to claim immediate payment of compensation.

Dicta of Lord Hanworth M.R. in *Williams* v. *Tredegar Iron and Coal Co., Ltd.* (1927) 20 B. W. C. C. 480 and *West Leigh Colliery Co., Ld.* v. *McNeil* (1929) 22 B. W. C. C. 541, dissented from.

APPEAL by the applicant from a decision of the deputy judge of the Middlesex County Court, sitting at Barnet, dismissing his application for a declaration of liability.

The appellant Cole was in the employment of United Dairies (London), Ld., as a milk roundsman. On November 26, 1938, his cart was upset by accident and he was injured by broken glass, with the result that he lost his right ear. He was paid compensation in full until May 1, 1939, on which date the respondents took him back into their employment. They did not re-engage him as a roundsman, one of their managers stating that he did not think that the customers would like his disfigurement, but put him to work in their yard at a somewhat lower wage than that which he had earned as a roundsman and paid him compensation at a reduced rate. On September 1, 1939, payment of compensation was stopped. On June 30, 1940, the applicant was called up for service in the Army.

The application was for compensation at the rate of 9*s.* a week from September 1, 1939, to June 30, 1940, and for a declaration of liability. The respondents submitted to an award of 9s. a week as claimed, and the judge made an award accordingly, but refused to make a declaration of liability, though there was no evidence before him contrary to what the manager had said, on the ground that having seen the applicant and observed the nature of his injury, he did not think that his disfigurement materially affected his chances of getting work as a milk roundsman.

P. H. Thorold Rogers for the appellant.

R. M. H. Everett and *H. Lester* for the respondents.

The arguments are fully set out in the judgment of the Master of the Rolls.

SIR WILFRID GREENE M.R. [after stating the facts :] The appellant claimed in these proceedings payment of 9s. a week from September 1, 1939, until June 30, 1940. To that claim the respondents put in an answer in which, while denying liability, they submitted to pay compensation at the rate of 9s. a week from September 1, 1939, to June 30, 1940, as claimed. I attach no importance, for the purposes of the decision of this case, to the fact that that offer was made, or to the fact that, when the matter came on for hearing, the order for payment of that amount was made without any opposition by the respondents.

The learned arbitrator refused to grant any declaration of liability, which was the substantial relief that the appellant was claiming. That was not claimed in the original particulars; but due notice was given of an intention to ask for an amendment of the claim at the hearing; and no point arises upon that.

The ground upon which a declaration of liability was asked was that the physical disfigurement from which the appellant was suffering as a result of the loss of his ear was such as to prejudice him in obtaining employment as a roundsman, because customers do not like milk to be delivered by a roundsman so disfigured. The way the learned judge dealt with the matter was this. The evidence by the appellant himself was that when on May 1 he was taken back and put to work in the yard, one of the respondents' managers said: "he did not think the customers would like my disfigurement."

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Looking at that statement alone, it is a statement of weight and importance in this case, because it is a statement by a person who should know the habits, tastes and prejudices of customers and what would be likely to offend them. That admission having been made by the manager, it was perfectly properly put in evidence by the appellant himself stating what the conversation was. In strictness it is a type of expert evidence upon a matter which is in my judgment a matter for evidence, and not a matter for guessing without any evidence upon it. It does not seem to me to be relevant to consider the other evidence in dealing with this appeal. The appellant was put into Army medical category 1; and, no doubt, his particular injury was not one which would affect his capacity in the Army. But the learned arbitrator, having before him no evidence to the contrary of what the manager had said, came to a conclusion which he expressed in these words: "Having seen the applicant in the witness-box, "I doubt whether the reason given to the applicant by the "respondents' managing director"—he was in fact a manager —"for refusing to employ him as a milk roundsman was the "real one. In my opinion the applicant's disfigurement was "not such as to reduce his chances of getting work in his "pre-accident occupation." The learned arbitrator had done what he was perfectly entitled to do. He had seen the applicant and had observed the nature of his injuries. But he appears to have based his decision upon the result of that observation, which led him to reject the statement which the manager had made, in holding that the appellant's account of the conversation was incorrect and thinking that the manager might well have had some other reason than that which he gave. Therefore, the learned arbitrator was putting his own observation against what I have already said was really a type of expert evidence. In my judgment the learned arbitrator was not justified in doing that. The only evidence here was all one way; and he was not entitled to reject it and substitute a conclusion of his own, based upon his personal observation of the man, without having evidence before him as to what really would be likely to take place in a trade such as this, and what the idiosyncrasies, tastes or dislikes of customers might be. The proper way to obtain information of that kind is by evidence of persons who are acquainted with the trade. Here there was such evidence; and it was all one way. If there was nothing in it, it could have been contradicted. If the reason which the manager gave to the appellant, according to the appellant's account, was not a true reason, the manager could have been called to say what the true reason was. In that state of the evidence, the learned arbitrator was not entitled, in my opinion, to proceed as he did; and he was bound to accept the evidence before him as to the probable effect of this injury.

On that basis the position is that the appellant has established what it is necessary for him to establish, namely, a reasonable probability that the result of his accident will lead to incapacity in the future, if and when he seeks to obtain work at his old type of employment. It seems to me that that is a matter which the learned arbitrator should have found to be established as a fact.

It is argued by Mr. Everett on behalf of the respondents, that notwithstanding that, the case is not one in which a declaration of liability ought to be made. The first point which he takes is that in dealing with declarations of liability as distinct from immediate awards, such an incapacity to earn owing to a disfigurement ought not to be treated as sufficient, and that the actual incapacity must be due to some physical inability to do the work which was not present in this case. That distinction he founds on some observations of Lord Hanworth M.R., to which I shall refer in a moment. Lord Macnaghten, in *Ball* v. *William Hunt & Sons, Ld.* (1), put the position in these words: " ' Incapacity for work,' as "the phrase is used in the Schedule, seems to me to be a "compendious expression meaning no more than inability to "earn wages, or full wages as the case may be, at the work "in which the injured workman was employed at the time of "the accident." Taking that statement, I ask myself in the present case, is this workman, disfigured as he is, reasonably likely to be able to earn full wages at the work of a roundsman if and when he comes out of the Army and seeks to go back to that employment ? I should think that there could be no question about that. In a business where the personal appearance of a man is of importance, where some disfigurement is a matter which makes him a less efficient man in the particular job, the incapacity due to personal disfigurement is no different in quality to an incapacity of, let me say, a skilled precision workman caused by some physical injury, like the loss of fingers. The two cases, it seems to me, are exactly on a par. Speaking without reference to what has been said before, I should have thought that there was no justification for drawing any such distinction as that contended for by Mr. Everett in his argument.

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(1) [1912] A. C. 496, 500; 5 B. W. C. C. 459, 463.

But our attention has been called to two cases in this Court, *Williams* v. *Tredegar Iron and Coal Co.* (1) and *West Leigh Colliery Co., Ld.* v. *McNeil.* (2) In both those cases Lord Hanworth M.R. expressed the view that the case of *Ball* v. *William Hunt & Sons, Ld.* (3)—I am not quoting his words, but only the effect of them—only applies in a case of an immediate award, and does not apply in a case of declarations of liability.

Ball v. *William Hunt & Sons, Ld.* (3), was a case where the question of disfigurement of a man arose in the circumstance that he had lost the sight of one eye ; but to all appearances he was still a two-eyed man. He then suffered a new accident, as the result of which the blind eye had to be removed ; and he could no longer conceal his infirmity. It was, therefore, really a disfigurement case. Lord Hanworth expressed the view that an incapacity of that character, when a declaration of liability was sought, was not sufficient to warrant the granting of such a declaration. With all respect to the observations of Lord Hanworth, I cannot myself agree with them. I am fortified in taking that view by the fact that, when the judgment of Scrutton L.J. in *Williams* v. *Tredegar Iron and Coal Co.* (1) is read, it is clear from the passage in which he refers to *Ball* v. *William Hunt & Sons, Ld.* (1), that he is taking the opposite view. Sargant L.J. does not deal with that aspect of the case at all in his judgment. The case was in fact one where there was no evidence but only a pure guess, apparently put forward by counsel, that the man's injury which resulted in a limp would put him at a disadvantage when seeking for work. That was the real nature of that case.

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(1) 20 B. W. C. C. 480.

(2) 22 B. W. C. C. 541.

(3) [1912] A. C. 496, 500 ; 5 B. W. C. C. 459, 463.

What Lord Hanworth said was by way of dictum only; and, accordingly, I do not find myself in any way hampered by authority in taking the view which I do take that incapacity due to physical disfigurement, which does not in fact stop a man performing his actual work, is of precisely the same character and of precisely the same weight in deciding whether a declaration of liability should be granted as a physical disablement which impedes a man in the actual physical execution of his work.

The other point taken by Mr. Everett was of this nature. He said that in order to obtain a declaration of liability, there must be no incapacity at the moment. He bases that submission upon the language of Lord Birkenhead in *King* v. *Port of London Authority*. (2) It is to be observed that the language of Lord Birkenhead in that passage does not purport to lay down what is necessary and essential in order that a declaration of liability should be granted. What he says is this: "It would in my view have been disastrous if it were "necessary to adopt a construction of the Act which excluded "from its operation the case of an applicant in respect of "whom it was proved (1.) that he had sustained injury by "accident arising out of and in the course of the employment; "(2.) that there was no incapacity at the moment, but (3.) that "it was reasonably probable that incapacity would arise at a "later day." He has stated those three elements which are elements in the ordinary case. He is saying that, if a man can prove all that, it would be disastrous if he could not get relief. But language of that kind must not be read as exclusive.

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(1) [1912] A. C. 496.
(2) [1920] A. C. 1, 12; 12 B. W. C. C. 260, 265.

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Greene M.R.

What is said by Mr. Everett here is that if this appellant is suffering from incapacity when he comes back to the milk business, he must be suffering from precisely the same incapacity now; and, therefore, he says the appellant is unable to prove that he is suffering from no incapacity at the moment. In my view it is not possible to extract from the words of Lord Birkenhead any support for that argument. The fact in the present case is that the man is serving in the Army, and it is not practicable for him to be engaged in the employment of a milk roundsman.

It was suggested that he might be entitled to compensation notwithstanding that he is in the Army. I want to make it perfectly clear that that is a matter which is not in issue in this case. There has been no argument upon it; and I express no opinion upon it whatsoever.

But even assuming that to be so, there was no obligation on the man to take compensation. I can see no reason why a man, assuming that he was entitled to compensation though he was in the Army, should not come to the Court and say: "I do not claim this compensation at the moment; but I ask "for a declaration of liability for the future." It seems to me that it would be a great misfortune if the Court were unable to grant a declaration of liability in circumstances such as those. In the present case, if the man had any right at all to claim an immediate money payment, he has not chosen to do so. That seems to me to be quite sufficient.

After all, there is no magic about declarations of liability. In every award there is, so to speak, inherent a declaration of liability. The object of a declaration of liability is to ensure that a person who, for some reason or another, is not getting compensation at the moment, does not have his position prejudiced by being put in the situation of having at a later date, possibly after the evidence has been scattered or is not available, to ask for his compensation, in view of some change of circumstances, or something which has happened. That is the object of a declaration of liability: and I can see no reason at all, if the facts warrant such a declaration being made, why it should not be made in a case where a man is entitled, or may be entitled to immediate compensation, but does not choose to ask for it, or does not choose to litigate about it, and is content to accept the position that at the moment he will make no such claim, provided that his rights in the future are secured. It is to secure a man's rights for the future that a declaration of liability is made. In my opinion, in the present case, there is no reason at all why it should not be granted; and on principle it ought to be granted.

In the result, therefore, the appeal will be allowed, the declaration of liability will be made, and the appellant must have the costs here and below.

CLAUSON L.J. I agree.

DU PARCQ L.J. I also agree.

Appeal allowed.

Solicitors: *C. Grobel, Son & Co.*; *James Turner & Son & Whitehouse.*

H. L. L.

1940
Oct. 23.

MAGUIRE *v.* CROUCH.

Motor-car — Trolley-bus — Vehicle left "at rest in . . . . such "circumstances as to be likely to cause danger" to other road users —Hand-brake insufficiently applied—Injury to pedestrian through vehicle moving down gradient—Whether an offence committed—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 50.

By s. 50 of the Road Traffic Act, 1930: "If any person in "charge of a vehicle causes or permits the vehicle . . . . to "remain at rest on any road in such a position or in such condition "or in such circumstances as to be likely to cause danger to other "persons using the road, he shall be guilty of an offence."

A trolley-bus was left by the driver at rest at the near side of a road and in a position where the front wheels of the vehicle were on a slight down-gradient. The driver failed to leave the hand-brake so applied as to hold the vehicle securely, and in consequence it moved forward of its own weight and knocked down and injured a pedestrian:—

Held, that an offence had been committed, for the language of s. 50 was wide enough to cover the case where a vehicle was left in such circumstances as to be likely to cause danger, even though it was not a cause of danger while remaining at rest.

APPEAL, by way of Case stated, from a decision of the Recorder of Brighton.

An information was preferred by the appellant, Gerald Edward Crouch, at a court of summary jurisdiction sitting at Brighton, alleging that the respondent, Daniel Joseph Maguire, an omnibus driver, had committed an offence under s. 50 of the Road Traffic Act, 1930, by leaving a trolley-bus, of which he was in charge, at rest on a road in such circumstances as to be likely to cause danger to other persons using the road. The justices convicted the respondent and fined him 5*l.*, but on appeal to the quarter sessions the Recorder quashed the conviction, and stated a case for the opinion of the High Court.

The following facts were proved or admitted:—

On November 6, 1939, Maguire was in charge of a trolley-bus owned by the Brighton Corporation. While engaged in driving the vehicle on a recognized route, in the course of his duties he stopped it at the near side of a road and left it in order to visit a urinal. After the vehicle had been left for

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a few seconds it moved forward of its own weight, there being a slight down-gradient under the front wheels. It travelled across the road and collided with a post on the pavement. At that point the driver regained the vehicle, but, before he could halt it, it knocked down and seriously injured a pedestrian. The cause of the vehicle's moving from its stationary position was the fact that the driver had failed to leave the hand-brake, which was in proper working order, in such a position as to hold the trolley-bus securely. The proper application of the hand-brake was the only means of securing the vehicle while it was at rest in such circumstances.

The prosecutor now appealed.

Harold J. Brown for the appellant. This trolley-bus, left stationary, with its brakes insecurely applied, and at the top of a hill, was a potential danger to other users of the road. Sect. 50 is sufficiently wide to cover such circumstances as these, and this driver committed an offence under the Act.

Geoffrey Lawrence for the respondent. Sect. 50 only contemplates an offence committed by a driver or other person in charge of a vehicle when it is at rest. The danger to other users of the road must be present when the vehicle is " at rest." In the present case there was no danger while it was stationary. It was only when it commenced to move, and was no longer at rest that the danger existed.

[LORD CALDECOTE C.J. The question is whether a vehicle at rest in such circumstances as existed here can be likely to cause danger.]

While it remained at rest in such circumstances it was causing no danger.

[HAWKE J. Why should we read into the section the words " likely to cause danger while stationary " ?]

That would be giving effect to the operative words of the section, but it is unnecessary, because the operative words " remain at rest " are already there.

LORD CALDECOTE C.J. [having recited the facts, continued :] The question is whether the language of s. 50 of the

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Lord
Caldecote C.J.

Road Traffic Act, 1930, should be read as covering the circumstances of this case. The section makes it an offence to cause or permit a vehicle to remain at rest on any road in such a position or in such condition or in such circumstances as to be likely to cause danger to other persons using the road. The respondent here was charged with leaving a vehicle in such circumstances as to be likely to cause danger. I have very little doubt that when the section was drafted it was not drafted in contemplation of such circumstances as have arisen in this case, but the question still remains whether the language of the section, as enacted, does cover those circumstances. I have come to the conclusion that the language of the section is wide enough to cover the facts of this case, and that the respondent was rightly convicted of the offence with which he was charged. In my opinion emphasis is to be placed on the words " likely to cause danger." I do not think they mean the same as "is causing danger." It is sufficient if the vehicle is left in such circumstances as to be likely to cause danger, without the danger being actually caused. I hold that the learned Recorder was wrong in the view which he took of the case, and that the appeal must be allowed and the conviction restored.

HAWKE and HUMPHREYS JJ. concurred.

Appeal allowed.

Solicitors for appellant : *Palmer, Bull & Mant, for F. W. A. Cushman & Son, Brighton.*

Solicitor for respondent : *J. G. Drew, Brighton.*

A. W. G.

SOUTHERN (H.M. INSPECTOR OF TAXES) *v.* BORAX CONSOLIDATED, LIMITED.

1940
Oct. 15, 16.

Revenue—Income Tax—Mode of assessment—Profits of trade—Deductions—Money expended as legal expenses—Action impugning company's title to land situate abroad—Money expended in defending action—Expenditure incurred wholly and exclusively for the purposes of company's trade—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schedule D, Case I.*

A company, which was domiciled in the United Kingdom and whose business consisted in the mining, manufacture and sale of borax, acquired, for the purpose of its business, land in California near the city of Los Angeles, upon which a subsidiary company erected wharves and buildings. The city of Los Angeles brought an action against the company alleging that the company's title to the land and buildings was invalid. The company defended the action and in so doing incurred costs amounting to 6249*l.*, which sum the company claimed to be entitled to deduct as a business expense in computing its profits for the purpose of assessment to income tax on the ground that those costs had been wholly and exclusively incurred for the purposes of its trade. It was contended by the Crown that the expenditure was a capital expenditure as the action was contested in order to preserve the capital assets of the company :—

Held, that, as the land in connection with which the expenditure was incurred was land situated abroad and not subject to income tax under Schedule A, the Inland Revenue Commissioners were entitled to find on the evidence that this expenditure was wholly and exclusively laid out for the purposes of the company's trade, and was an allowable deduction in computing the profits of the company for income tax purposes.

Commissioners of Inland Revenue v. *Scottish Central Electric Power Co.* (*No.* 2) 1931 S. C. (H. L.) 36 ; 15 Tax Cas. 761 distinguished.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London, pursuant to the provisions of s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

At meetings of the Commissioners held on June 20, 1938, and February 20, 1939, Borax Consolidated, Ld., an incorporated company having its registered office at Regis House, King William Street, in the said city (hereinafter called "the company") appealed against an assessment to income tax made upon it under Case I. of Sch. D, of the

Income Tax Acts for the year ended April 5, 1938, in the sum of 422,976*l.*, less wear and tear, 51,689*l.*

2. The question for the determination of the Commissioners was whether a sum of 6249*l.*, representing legal expenses incurred in the circumstances hereinafter set forth was deductible in computing the profits of the company for the purposes of the said assessment.

3. The company, whose business consisted in the mining, manufacture and sale of borax and other mineral products, was the holder of the whole of the capital of a Nevada corporation called the Pacific Coast Borax Company (hereinafter called "the Pacific company").

4. On the facts of the relevant years it was agreed between the Inland Revenue and the company that the business of the Pacific company should be treated as a branch of the company's business, and accordingly for the purposes of assessment to income tax the profits of the Pacific company fall to be included in computing the profits of the company.

5. In 1923 the company for the purposes of its business acquired land in Mormon Island, in California, near Los Angeles, of which the Pacific company was put into possession, and upon which the Pacific company erected wharves and buildings. The Pacific company did not pay any rent or other consideration for the use of these premises, its business being considered to be a branch of the business carried on by the company.

6. The Pacific company's business consisted in the mining, preparation and shipment of borax.

7. In 1929 the city of Los Angeles, in order to put itself in a position to obtain wharfage dues and rents from the company or from the Pacific company, commenced an action in the Federal District Court of Los Angeles against the company and the Pacific company claiming that the company's title to the land and buildings occupied was invalid, and that such land and buildings were in fact the property of the city. This action was defended by the company and by the Pacific company.

8. After six years of litigation a new trial was ordered, and the costs incurred by the Pacific company up to that time amounted to 6249*l.*, which sum the company claimed to be

entitled to deduct as a business expense in computing its profits for the purposes of assessment under the arrangement referred to in para. 4 hereof.

9. Mr. Frank M. Jennifer, the president of the Pacific company (whose evidence the Commissioners accepted), stated that the object of the city of Los Angeles in bringing the action was admittedly to require the Pacific company to pay toll for the use of the wharves. Part of the property consisted of foreshore and the City contended that a grant of foreshore was invalid. If the action was lost the Pacific company would have to pay tolls for the use of the wharves, probably retrospectively, and they estimated the cost of such tolls at about 40,000 dollars per annum.

10. It was contended for the company that the said expenditure was incurred by the Pacific company wholly and exclusively for the purpose of its trade, and that in computing the profits of the company on the basis that the trade of the Pacific company was a branch of the trade of the company, such expenditure was deductible.

11. It was contended by the Inland Revenue that the action concerned the capital assets of the company and was contested to preserve the existence of those assets, and was capital expenditure.

12. The following cases were referred to: *Strong & Co. of Romsey, Ld.* v. *Woodifield* (1); *Van den Berghs, Ld.* v. *Clark* (2); *Inland Revenue Commissioners* v. *Scottish Central Electric Power Co.* (3); *MacTaggart* v. *B. & E. Strump* (4); *Inland Revenue Commissioners* v. *Wilson's Executors* (5); *Mallett* v. *Staveley Coal & Iron Co., Ld.* (6).

The Commissioners found on the evidence that the said sum of 6249*l.* was wholly and exclusively laid out by the Pacific company for the purposes of its trade and was an allowable deduction in computing the profits of the company for income tax purposes and the appeal succeeded.

(1) [1906] A. C. 448; 5 Tax Cas. 215.

(2) [1935] A. C. 431; 19 Tax Cas. 390.

(3) 1931 S. C. (H. L.) 36; 15 Tax Cas. 761.

(4) 1925 S. C. 599; 10 Tax Cas. 17.

(5) 1934 S. C. 244; 18 Tax Cas. 465.

(6) [1928] 2 K. B. 405; 13 Tax Cas. 772.

The Inspector of Taxes thereupon expressed dissatisfaction with the finding of the Commissioners as being erroneous in point of law, and required the Commissioners to state a case for the opinion of the High Court of Justice, which the Commissioners stated and signed accordingly.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown.

J. Millard Tucker K.C. and *J. S. Scrimgeour* for the respondent company.

The arguments appear sufficiently from the judgment.

LAWRENCE J. This is an appeal from the General Commissioners whereby they decided that a sum of 6249*l.*, which represented legal expenses incurred in resisting an action to dispute the title of the respondent company to real property which the company held, was a proper deduction for the purposes of income tax. The real property in question was in the United States of America, in an island called Mormon Island, in California, near Los Angeles.

[His Lordship read paras. 4, 5, 7 and 8 of the case and the finding of the Commissioners set out above, and proceeded:]

The argument on behalf of the Crown is, that this sum of 6249*l.* was not wholly and exclusively laid out for the purposes of the company's trade, but was laid out in the interests of the company as owner of the property, and reliance is principally placed upon the *Scottish Central Electric Power Co.'s* case. (1) In the second place it is argued by the Crown that in any event the sum of money paid in defending this action was properly attributable to capital and not to revenue.

The Solicitor-General, in opening the appeal, put five tests by which it could be decided whether a deduction was a proper deduction under the Income Tax Acts: First, does it relate to the main framework of the taxpayer's business; if so, it is not deductible; and in support of that proposition he cited the case of *Van den Berghs, Ld.* v. *Clark.* (2) In the second place, was it made in the capacity of trader or property

(1) 1931 S. C. (H. L.) 36; 15 Tax Cas. 761.
(2) [1935] A. C. 431; 19 Tax Cas. 390.

owner; and the principal support for that proposition was the *Scottish Central Electric Power Co.'s* case (1), to which I have already referred. The third test was whether the payment was recurrent; and the fourth, was it in connection with or out of fixed or circulating capital; and the fifth, does it result in bringing into existence an asset for the enduring benefit of the trade.

A large number of cases were cited on behalf of the Crown, and I will deal with them when I come to deal with the question whether this payment is properly attributable to capital or to revenue, but in the first place I will deal with the question whether it is wholly and exclusively laid out for the purposes of the company's trade. On that there is the express finding of the commissioners that it was, and the question that I have to decide, it seems to me, is whether I ought to hold that the result of the *Scottish Central Electric Power Co.'s* case (1), is that it is impossible for the commissioners as a matter of fact to come to the conclusion that such an expenditure as this was wholly and exclusively laid out for the purposes of the company's trade.

In my opinion the *Scottish Central Electric Power Co.'s* case (1) cannot be cited as an authority for that proposition. It was a case in which the House of Lords was dealing with land in Scotland, in respect of which the owner of the land, who was also the occupier, had to pay owner's rates, and in accordance with the terms of the Income Tax Acts an allowance might be made under Schedule A for such owner's rates; the company had claimed such an allowance and obtained such an allowance under Schedule A, and after obtaining that allowance under Schedule A the company attempted to deduct again the amount of the owner's rates as a payment wholly and exclusively laid out for the purposes of the company's business under Schedule D, but the House of Lords by a majority decided that they could not. It is perfectly true that in my opinion, at any rate, the majority (composed of Lord Warrington, Lord Thankerton and Lord Macmillan) do base that judgment upon the ground that the

(1) 1931 S. C. (H. L.) 36; 15 Tax Cas. 761.

payment of the owner's rates was a payment made qua owner and not qua trader, and it was, therefore, not wholly and exclusively laid out for the purposes of the company's trade. But the House of Lords was dealing with land situated in the United Kingdom, and owner's rates are an imposition upon land which are specifically dealt with by the terms of the Income Tax Acts, under Schedule A. It appears to me that that decision is not decisive at all with reference to land situated abroad which is not liable to income tax under Schedule A, and that that decision cannot be cited as an authority which prevents a tribunal of fact coming to the conclusion upon the facts that certain sums of money were wholly and exclusively laid out for the purposes of the trade although they relate to real property. It seems to me that ownership of land may in certain circumstances be as necessary for the purposes of trade as the acquisition of a lesser interest in the land; it may be that the land desired can only be bought. Here in this case, so far as the facts appear, it appears probable that it was necessary for the company to build their own permanent structures and wharves on the land in question, and I am therefore of opinion that there was evidence upon which the Commissioners could properly find that this sum of money was wholly and exclusively laid out for the purposes of the company's trade.

The case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) was referred to by counsel for the respondents, and it was there held that repairs to buildings, fire insurance premiums, rates and taxes and legal costs were all proper deductions for the purposes of income tax in England although the land was in England. It seems to me that those expenses had the effect of preserving the landlord's interests just as much as defending an action attacking his title.

On the other question whether this is a payment properly attributable to capital or to revenue, in my opinion the principle which is to be deduced from the cases is that where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company. As I suggested to counsel for the Crown, the only way in which it can be said that there was here any alteration in the capital assets of the respondent company was that the city of Los Angeles had been removed from the category of possible litigants who might challenge the company's title.

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(1) [1915] A. C. 433; 6 Tax Cas. 399.

I cannot think that that makes the payment a capital payment. The title of the company, which must be assumed, in my opinion, to have been a good title, remains the same; there is nothing added to the title or taken away, and the title has simply been maintained by this payment. All the cases cited by the Crown appear to me to be consistent with the principle which I have stated.

The first case cited was the *Granite Supply Association, Ld.* v. *Kitton* (1), where what was held to be a capital payment was a payment for carting materials from an old yard to a new one, and there it seems to me it was looked upon as being a part of the cost of acquisition of the new yard. In the case of *John Dow* v. *Merchiston Castle School, Ld.* (2), the matter concerned what is called in Scottish law a duplicand of feu-duty, which fell to be paid by the terms of the original feu charter for twenty-one years. It was held that that was not a proper deduction. It is perfectly true that the judgment was based principally upon the view that it was an imposition, or at least it was a payment made by the owner qua owner, and that it was therefore not a proper deduction. But that again was a case like the *Scottish Central Electric Power Co.'s* case (3), where the land in question was taxable under Schedule A. Apart from that, the decision, in my opinion, in that case is otherwise perfectly consistent with the principle which I have stated, since the duplicand of feu-duty was payable by the terms of the original charter and could properly be looked at—I cannot say that it was properly looked at—as part of the original cost of the capital asset.

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(1) (1905) 5 Tax Cas. 168; 43 Sc. L. R. 65.
(2) (1921) 8 Tax Cas. 149; 58 Sc. L. R. 585.
(3) 1931 S. C. (H. L.) 36; 15 Tax Cas. 761.

The case of *Robert Addie & Sons' Collieries, Ld.* v. *Inland Revenue Commissioners* (1) was a case of a mineral lease, which was admittedly a fixed capital asset, and by the terms of the mineral lease the lessee had an option either to restore the surface or to pay a sum of money, and he chose to pay a sum of money. It appears to me that there again it was part of the price of the acquisition of the capital asset. He got the lease on the terms of either restoring the surface or paying, and he paid, and it was therefore capital.

The case of *MacTaggart* v. *B. & E. Strump* (2) was the case of a premium paid to secure renewal of a lease. There again there was a new capital asset secured.

In *British Insulated and Helsby Cables, Ld.* v. *Atherton* (3), Lord Cave laid down as a general test that "when an expenditure is made, not only once and for all, but with a "view to bringing into existence an asset or an advantage "for the enduring benefit of a trade, I think that there is very "good reason (in the absence of special circumstances leading "to an opposite conclusion) for treating such an expenditure "as properly attributable not to revenue but to capital." So here if it could be said that this expenditure had in any way altered the original character of the capital asset which was acquired by the respondent company I should have taken the view that the payment was in respect of capital, but as the capital asset of the respondent company, in my opinion, remained absolutely unaltered, that payment is properly attributable to revenue.

The case of *Mallett* v. *Staveley Coal and Iron Co., Ld.* (4), was a case of a payment which was made by a mineral lessee for the privilege of being allowed to surrender seams of coal. That again was, in my opinion, a loss on the realization of the capital asset.

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(1) 1924 S. C. 231; 8 Tax Cas. 671.

(2) 1925 S. C. 599; 10 Tax Cas. 17.

(3) [1926] A. C. 205, 213; 10 Tax Cas. 155, 192.

(4) [1928] 2 K. B. 405; 13 Tax Cas. 772.

Then in *Van den Berghs'* case (1) the question was as to a sum of money paid upon the cancellation of a contract which the House of Lords held related to the whole structure of the company. The view taken was that the whole structure of the company was the totality of its capital assets, and the payment made for an alteration of those capital assets was a capital payment.

On behalf of the respondent company the case of *Mitchell* v. *B. W. Noble, Ld.* (2), was referred to, and attention was drawn to the words of Lord Hanworth, where he said (3): "It was "a payment made in the course of business, with reference to "a particular difficulty which arose in the course of the year, "and was made not in order to secure an actual asset to the "company but to enable the company to continue to carry on, "as it had done in the past, the same type and high quality of "business, unfettered and unimperilled by the presence of one "who, if the public had known about his position, might have "caused difficulty in its business and whom it was necessary "to deal and settle with at once." That was a case in which a very large payment was made to get rid of a director, and it was held to be an income payment, and what counsel for the respondent company suggested was that it was looked upon by the Court as not being a payment which was made for the purpose of acquiring or realizing an asset, but simply for the purpose of preserving the asset of the company's goodwill. Sargent L.J. said (4): "The object, as disclosed by paragraph 9 "of the case, was that of preserving the status and reputation "of the company, which the directors felt would be somewhat "imperilled by the other director remaining in the business "or by a dismissal of him against his will, involving proceedings "by way of action in which the good name of the company "might suffer. To avoid that and to preserve the status and "dividend earning power of the company seems to me a "purpose which is well within the ordinary purposes of the "trade, profession or vocation of the company."

(1) [1935] A. C. 431; 19 Tax Cas. 390, 431.

(2) [1927] 1 K. B. 719; 11 Tax Cas. 372.

(3) [1927] 1 K. B. 737; 11 Tax Cas. 420.

(4) [1927] 1 K. B. 738; 11 Tax Cas. 421.

1940

SOUTHERN
v.
BORAX
CONSOLIDATED,
LD.

Lawrence J.

The other case which was relied upon by Mr. Tucker for the respondent company was the case of the *Rhodesia Railways, Ld.* v. *Collector of Income Tax, Bechuanaland Protectorate* (1), where a very large expenditure had been made by the railway company for the renewal of the rails—a renewal which was made annually, but was made, of course, in the ordinary business of the railway company after a certain period—and it was held there that the sum expended was not of a capital nature ; it was expended for repairs of property occupied for the purposes of trade, or in respect of which the trade was carried on. Lord Macmillan, in expressing the view of the Judicial Committee, said this (2) : "It did not result in the creation of any new asset ; it was "incurred to maintain the appellant's existing line in a state "to earn revenue. The analogy of a wasting asset which "appears to have affected the minds of the Special Court has "really no application to such a case as the present."

It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company and the fact that it was maintaining the title and not the value of the company's business does not, in my opinion, make it any different. I am of opinion that there is nothing in the cases which deal with payments that are made by an owner in respect of property which he owns in England, property which is liable to taxation under Schedule A, which renders it impossible for the tribunal of fact to find that expenditure in connection with land abroad not subject to income tax under Schedule A, was wholly and exclusively laid out for the purposes of the company's trade.

I am therefore of opinion that the decision of the Commissioners was right, and the appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for the Crown : *Solicitor of Inland Revenue.*

Solicitor for respondent company : *Ashurst, Morris, Crisp & Co.*

(1) [1933] A. C. 368.

(2) [1933] A. C. 374.

R. F. S.

POLLOCK *v.* CHARLES BURT, LIMITED.

C. A.
1940
Oct. 30, 31.

Master and servant—Common employment—Manager of branch shop and driver of motor car in service of same employers—Motor car used to drive manager on business of branch—Calling on possible customers—Work not usually done by manager—Motor car not ordinarily used for this work—Negligence of driver of motor car—Injury thereby caused to manager—Liability of employers.

The plaintiff was engaged as manager of one of the defendants' branch shops. He was told that as manager he would have to be prepared to do anyone else's work, and that he must not leave the shop for any length of time without the permission of the head office. One of the activities of the branch was the mail order work in which a person from the branch called upon persons making inquiries in order to turn them into customers. The work entailed travelling long distances. This work was usually done by W., who used his own motor car which he drove himself. On one day W. was ill and the plaintiff asked the head office that some one should be sent to do the work. As no one was available the plaintiff volunteered to do the work. He then asked that a motor car should be sent to enable him to do the work. A motor car was sent to him driven by S., another servant of the defendants. While travelling in this car doing the mail order work, a collision occurred through the negligent driving of S. and the plaintiff was injured. In an action against the defendants :—

Held, by the Court of Appeal, that the plaintiff and S. were not in a common employment and that therefore the plaintiff was entitled to recover damages from his employers, the defendants.

APPEAL from a decision of Hilbery J.

The defendants, Charles Burt, Ld., were a limited company carrying on business as furniture dealers, with a number of branch shops in different parts of London.

On January 7, 1933, the plaintiff, Harry Pollock, was engaged as manager of the defendant company's Watford branch. At the interview in which the plaintiff was engaged he was told by Mrs. Berg, the managing director of the defendant company, that as manager of the branch he had to look after the shop and the accounts and supervise the staff, but that no employee of the defendant company was confined to any particular work, and that as manager he would have to undertake, if necessary, to do anyone else's work, even though it might be the loading of a van or the dressing of a window.

The plaintiff agreed to these conditions. The plaintiff was also told that it was his duty as manager ordinarily to remain at the branch during business hours to supervise the business of the branch.

One of the ordinary business activities of the branch was what was called "mail-order" business. Mail-order work consisted in calling upon persons who sent by post an inquiry or a request for a catalogue, with the object of turning the inquirer into a customer. The man who usually attended to the mail-order work was a man named Williams. The work necessitated travelling long distances and in the ordinary course Williams used his own motor-car for the work and received an allowance from the defendants in respect of the use of this car. The plaintiff had been out on mail-order work on two occasions between the time of his employment and the time of his accident and had on those occasions been driven by Williams in Williams' car.

On December 7, 1938, Williams was ill and away from work. On that morning there were a number of mail-order inquiries. It was the plaintiff's duty as manager not to leave the shop for any length of time without special permission from the head office. The plaintiff rang up Mrs. Berg on the telephone and told her that as Williams was away ill he had no one to attend to the mail-order inquiries, of which there were a number that day. He asked whether the head office could spare a man from another branch. Mrs. Berg told the plaintiff that that was improbable and the plaintiff then volunteered to go out on the work himself if Mrs. Berg would agree. Mrs. Berg did agree to his doing the work and the plaintiff then informed her that there would be a great distance to cover and asked if he could have a car from the head office. Mrs. Berg told the plaintiff that a car, which would be driven by a servant in the employ of the defendant company named Spencer, would be sent to Watford for the plaintiff to use on the mail-order business. The plaintiff used the car driven by Spencer on that day, calling upon various persons and doing the mail-order work of the branch. He was unable to finish the calls that night, and in the evening he telephoned to Mrs. Berg and asked permission to carry on with the same work in the same way on the following day. He was given permission and on December 8 the same car with Spencer driving was sent to Watford for use by the plaintiff on the mail-order work.

On December 8, while the plaintiff was being driven by Spencer in this car along the road from Royston to Baldock to make one of the necessary calls, a collision occurred with another car and the plaintiff was injured.

The plaintiff brought an action against the defendant company and the driver of the other car to recover damages for the personal injuries he had sustained. The defendant company by their defence relied upon the plea that the plaintiff and Spencer were in a common employment. It was held by the Court of Appeal that the collision was solely due to the negligent driving of Spencer.

The question whether the defendant company was free from responsibility for the negligent act of Spencer by reason of the doctrine of common employment was then ordered to be tried.

Spencer in giving evidence said that he entered the defendant company's employment in January, 1936, and that he drew his wages each week at the head office; that during the day he was driving the car as and when and where he was required, on messages, to the bank; taking the managing director wherever she might need to go; and calling sometimes at the branch shops in connection with the business of a branch.

Hilbery J. held that the plaintiff took upon himself the natural risks and perils incident to the performance of the mail-order work amongst the other services which he might be required to perform in connection with the Watford branch. The plaintiff must have known that the mail-order business from its very nature necessitated the use of a vehicle in which the person making the calls would either drive himself or be driven. The plaintiff must have impliedly taken upon himself the natural risks and perils incident to the mail-order work on any occasion upon which he was called upon to do it, including the risks incidental to being driven by a fellow servant in the employ of the defendant company. At the time of the accident the plaintiff and Spencer were engaged in a common work as well as being in the service of a common master. The claim of the plaintiff was therefore met by the plea of common employment. The learned judge also held that the plaintiff volunteered for the work in question, and that on the authorities a claim by a volunteer for personal injuries might be met by the defence of common employment. He therefore gave judgment for the defendant company.

The plaintiff appealed. The appeal was heard on October 30, 31, 1940.

M. Turner-Samuels and *Muir Hunter* for the appellant. The decision of Hilbery J. was wrong. The plaintiff and Spencer were not in common employment. In order that the doctrine of common employment should apply it is essential that the two necessary ingredients of the doctrine should be present, there must be a common master and also a common employment. In the present case the plaintiff and Spencer had a common master but they were not engaged in a common employment. The two persons were brought together, after they had been in the same employment for five years, in the performance of a particular job. That is not common employment. The two persons were doing something in common, but there was nothing common in the substratum of their work. Juxtaposition in employment can only amount to common employment if it arises out of a contract and involves a risk which inevitably arises from the employment. The plaintiff never accepted the consequences of the negligence of Spencer in driving the car, which did not belong to the Watford branch of the defendant company, and which was not usually used in the business of that branch. There was no nexus between the plaintiff's ordinary employment and the transaction upon which he was engaged when he met with the accident. The plaintiff was not a volunteer but a servant who was asked by his employer to do some work outside his ordinary employment which involved a risk which he did not accept. The doctrine of common employment arose when a number of men were employed on certain premises and the men knew what their daily task was and what were the risks of that task and who were the men with whom they would be working. The doctrine of common employment was redefined by the decision of the House of Lords in *Radcliffe* v. *Ribble Motor Services, Ld.* (1). That decision put right the previous cases which had revolutionized the doctrine. It was suggested in that case that the doctrine applied because the men had a common master, but the House of Lords held (2) that "the rule does not "apply where the injured man and the negligent co-employee "are not engaged in the same common work or are not fellow "labourers in the same work or are engaged in different "departments of duty." The position here is that of a master instructing a servant to do work outside the ordinary course of his work and to enable the servant to do that work the master puts in motion another servant who was ordinarily employed in another department of duty or work. In that case the latter servant is not in common employment with the first servant although they had a common master, and accordingly the negligence of the one which causes injury to the other is not an ordinary risk which enabled the common master to raise the defence of common employment. In very special circumstances the car was sent by the employers to Watford to enable the plaintiff not to discharge his ordinary duties but to do some special work. In those circumstances Spencer was not a fellow servant in common employment with the plaintiff. The two men met on the two days in December in special circumstances but not in a common employment. The doctrine of common employment cannot be inferred unless there was a contract to perform certain services and the risk was one incidental to the performance of those services. Inasmuch as the plaintiff was employed on the terms that he would not leave the shop without the permission of his employers it is difficult to see how it can be said that by that contract he undertook the risks attached to a journey in a car driven by a fellow servant on the road.

(1) [1939] A. C. 215.

(2) Ibid. 238.

Russell Vick K.C. and *R. J. White* for the respondents. The decision of Hilbery J. was correct. The doctrine of common employment was thus stated by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (1): "When several workmen "engage to serve a master in a common work, they know, "or ought to know, the risks to which they are exposing "themselves, including the risks of carelessness, against which "their employer cannot secure them and they must be "supposed to contract with reference to such risks." That passage was cited with approval by Lord Atkin in *Radcliffe* v. *Ribble Motor Services, Ld.* (2). Blackburn J. stated the principle thus in *Morgan* v. *Vale of Neath Ry. Co.* (3): "That principle I take to be that a servant who engages for "the performance of services for compensation, does, as an "implied part of the contract, take upon himself, as between "himself and his master, the natural risks and perils incident "to the performance of such services; the presumption of law "being that the compensation was adjusted accordingly, "or, in other words, that the risks are considered in his wages." Blackburn J. also said (4): "There are many cases where "the immediate object on which the one servant is employed "is very dissimilar from that on which the other is employed, "and yet the risk of injury from the negligence of the one "is so much a natural and necessary consequence of the "employment which the other accepts, that it must be "included in the risks which are to be considered in his "wages." That dictum directly applies to the present case. Lord Macmillan in *Radcliffe* v. *Ribble Motor Services, Ld.* said (5): "In the ordinary case of common employment "the nature of the employment is such as to bring the "employees into association with each other in carrying on some "activity in common, and it is from this association that "there arises the risk that one of those so engaged may be "injured by the negligence of another also so engaged." In the present case the plaintiff and Spencer were working side by side in a common operation which could not be carried out without their association. There was a common operation which could not be performed in the manner in which it was being performed without the co-operation of the two servants. When the plaintiff entered his employment he took the risks attached to all those jobs which came within the scope of his employment. If the plaintiff had gone in Williams' car to do this work and had been driven by Williams there could be no question but that the two men were in a common employment, and it makes no difference that the plaintiff went in another motor car belonging to the defendant company which was driven by a chauffeur who was also a servant of the defendant company. The plaintiff volunteered to do this work, and he asked for a motor-car which was driven by a fellow servant, and they were therefore engaged in a common employment. The common work was the obtaining by the plaintiff of mail-orders by the use of the motor-car which was being driven by Spencer, a fellow servant. Lord Herschell in *Johnson* v. *Lindsay & Co.* (1) cited with approval the judgment of Brett L.J. in *Swainson* v. *North Eastern Ry. Co.* when he said (2): "I think that the authorities bear "out the proposition laid down in the Exchequer Division "that in order to give rise to the exemption there must be a "common employment and a common master; it is not "necessary that there should be a common service for a definite "time or at fixed wages; for the exemption exists in the "case of volunteers and of other persons, where plainly there "has been no contract for payment; a volunteer puts himself "under the control of another person, and in respect of that "other person he is for the time being in the position of a "servant."

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(1) (1858) 3 Macq. 266, 295.

(2) [1939] A. C. 215, 227.

(3) (1864) 5 B. & S. 570, 578.

(4) Ibid. 580.

(5) [1939] A. C. 235.

MacKinnon L.J. The defence raised in this case by the defendants, Charles Burt, Ld., is that the plaintiff cannot recover damages against them in respect of the negligence of Spencer, because the plaintiff and Spencer were both their servants, and therefore the doctrine of common employment applies and prevents the plaintiff from recovering damages for the injuries which he sustained through the negligence of Spencer. The only question with which we are concerned is whether or not Hilbery J. was right in holding that the plaintiff was prevented from recovering damages from the defendants by reason of the doctrine of common employment. That doctrine was enunciated by Lord Abinger in 1837 and has since then been a matter for very considerable criticism, comment and explanation. In 1939 the House of Lords dealt with the matter in *Radcliffe* v. *Ribble Motor Services, Ld.* (1). It is of course not sufficient to debar a plaintiff from recovering damages from his employer for the negligence of another man also in his employment, from which negligence the plaintiff has suffered damage, merely to assert that they were both servants of the same employer in the sense that they were both paid their wages by him. There are limitations to the doctrine, of which two are I think material in the present case. In the latest examination of the question in *Radcliffe* v. *Ribble Motor Services, Ld.* (1), Lord Wright said (2): "The relevant limitation, in my "opinion, is that the rule does not apply where the injured "man and the negligent co-employee are not engaged in the "same common work or are not fellow labourers in the same "work or are engaged in different departments of duty." He perhaps illuminates that pronouncement in a later passage where he says (3) that in order that the doctrine of common employment should apply the two persons "must be employed "in common work, that is, work which necessarily and "naturally or in the usual course involves juxtaposition, local "or causal, of the fellow employees and exposure to the risk of "the negligence of one affecting the other."

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(1) [1891] A.C. 371, 377.

(2) (1878) 3 Ex. D. 341, 349.

I need not go in detail into the facts of this case, but, in my view, applying that test the plaintiff and Spencer were not, when this accident happened, engaged in the same common work, nor were they fellow labourers in the same work. They were in fact engaged in different departments of duty. The plaintiff's duty was to act as manager and on this occasion

(1) [1939] A. C. 215. (2) Ibid. 238. (3) Ibid. 249.

to attend to mail orders. Spencer's duty was to drive the motor car of the defendant company, carrying any servant or director of the defendant company from one point to another in the course of his duties.

On the facts, as to which there is really no dispute, and accepting the facts as found by the learned judge, I think that the result is that he was wrong in applying the doctrine of common employment so as to debar the plaintiff from recovering damages for the injuries sustained by him by reason of the negligence of Spencer, who happened to be another employee of the defendant company, and was paid his wages by them. On the question of law I think that this appeal should be allowed with costs.

LUXMOORE L.J. I agree and do not desire to add anything.

DU PARCQ L.J. I agree. I only desire to add a few words of my own upon the question of common employment. It is plain that the mere fact that the driver of this car and the plaintiff were fellow servants is not enough. As Lord Macmillan said in *Radcliffe* v. *Ribble Motor Services, Ld.* (1): "The chauffeur who drives his master to the works is not in a "common employment with his master's employees in the "works though they have a common employer." I have no doubt at all that, subject to any special circumstances which may appear in this case, it could not have been true to say that Spencer, who drove a car usually for the benefit of the directors, and the plaintiff, who had work of a very different kind to perform, were in common employment. In point of fact, it would have been quite possible, and might at one time have appeared probable, for the plaintiff to have gone through the whole course of his employment with the defendants without ever being driven in a car by Spencer or in the car, which was referred to sometimes as " the directors' car."

The first thing which I think one must notice in reading *Radcliffe* v. *Ribble Motor Services, Ld.* (1), is that this doctrine

(1) [1939] A. C. 215, 235.

of common employment always rests upon an implied contract. Lord Wright truly said (1): "It is difficult sometimes to fit "a factual qualification on a fictitious contract." I appreciate the difficulty of that.

In this particular case, it seems to me abundantly clear, when one looks at the evidence, that it is impossible to imply in this contract of service any term which would relieve the defendants from liability. It is quite true that, when the plaintiff was employed, he was told that he might have to do much work outside the usual scope of his employment as a manager, but, when we get a little closer to the facts of this case, I find that the lady managing director, who was giving evidence as to the terms of the contract—evidence which was ultimately accepted by the learned judge—was asked this question: "Was anything said about "outside calls, if he had to make any outside calls?" The answer she made to that question, after considerable delay, because of an objection which was taken to the question, was that the defendants wanted the outside work well looked after. That carried the matter no further, and the further question was asked: "What about himself going out? Was anything "said about what he was to do if he went out?" The lady replied: "All managers had instructions that they were "not to leave their branches for any length of time without "obtaining confirmation from head office." There was not a word to suggest that it would be likely at any time that he would be sent out in a car by the defendant company. It is quite true that after entering the company's service he was told on occasion to go out on this mail-order business, and that this necessitated his going in a vehicle, but it involved in ordinary circumstances his going with a fellow-employee in a car provided by that fellow-employee himself and driven by him. It is not necessary to consider whether if an accident had happened in these circumstances the doctrine of common employment would have applied. However that may be, I see no reason to think that on the day on which this accident happened there was anything at all in the contract of employment between the plaintiff and the defendants which obliged him to go in the directors' car. I think that he could have said: "I must do this mail-"order business, but I will do it in some other way. I will "take a cab, if I cannot do it by walking." I do not think that he could have been ordered to go in this car. If he had been technically minded he could have said: "It is not "part of my contract that I should be driven in the directors' "car by Spencer," just as he could have said, if a director had made an offer with regard to a car which was his own private car—one cannot imagine an employee saying it, but it would be open to him to say it—"I never agreed to be driven "in your private car."

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(1) [1939] A. C. 249.

I do not desire to repeat the references which have been made to *Radcliffe* v. *Ribble Motor Services, Ld.* (1). I think that when one looks at the quotation in that case (2) from the judgment of Blackburn J. in *Morgan* v. *Vale of Neath Ry. Co.* (3), which I do not propose to read again, great stress is laid by the House of Lords on the word " must " in the phrase "must be included" which occurs in that judgment. When one sees the principle which was applied by Sir Francis Jeune P. in *The Petrel* (4), and what was said by Lord Wright, it is reasonably plain that this case does not come within the rule laid down.

I only want to add a word about the other branch of the argument as I understand it. It is said, and Hilbery J. certainly took the view, that even if this plaintiff had not been a servant, but had volunteered on that particular day, although not bound to do so, to do this mail-order business, and had been driven in the car, then, on the principle which was laid down, for instance, in *Degg* v. *Midland Ry. Co.* (5), the defendants would have been absolved from liability. With great respect, it seems to me that neither that case nor any other establishes the proposition which is contended for here by counsel for the defendants. Again one has to see whether

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(1) [1939] A. C. 215.
(2) Ibid. 248.
(3) 5 B. & S. 570, 580.
(4) [1893] P. 320, 326.
(5) (1857) 1 H. & N. 773.

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there is any implied term by which the plaintiff was bound to take the risk of negligence of one who had become for the time being his fellow servant. I assume that *Degg's* case (1), was rightly decided. In that case workmen were in difficulties with a turntable, and a volunteer undertook to assist them, and it was decided that the volunteer became for the time being, in a sense, the servant of the employer, and a fellow worker with the other men, and that he must be taken to have impliedly agreed that he would take the risk of their negligence. However, that is a long way from saying that, when a man, who is not obliged to do some work, and is not obliged to go in a car, offers to do it and is given a lift in the car of the person for whose benefit he is doing the work, he and the driver of the car are then engaged in a common employment. It seems to me that there is all the difference in the world between the case of two men working at a turntable, or two persons, as I suggested in the course of the argument, engaged with others at hay-making, where the labour is obviously common labour with a common object, and the case of a man who has a particular piece of work which he wishes to do, and is being driven in a car by some person who has no concern with that particular work at all, but is concerned only to carry the person doing the work from one point to another for a purpose which does not concern the driver in the least, and with which he need not be acquainted. Looked at from the other point of view, it is even more apparent. Supposing that there had been at the works that day some kind person with a car and he had said: "There "seems to be some difficulty about this man going out on the "mail-order business. I will take him. Tell me where to go "and I will gladly go there." It seems to me to be the height of absurdity to suggest that that motorist would become a servant in common employment with the person to whom he was giving a lift, so that, if the man he was helping were to cause an injury to the motorist by some negligent act done in the course of his employment the motorist would be unable to recover damages from the man's employers. I am satisfied

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(1) 1 H. & N. 773.

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that we should not be giving effect to the decision of the House of Lords, which is now settled law, or indeed to the earlier decisions referred to in the opinions of the learned Lords, if we took any course other than that proposed by MacKinnon L.J., and I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Barnett Janner.*
Solicitors for respondents: *Jacobs & Greenwood.*

R. F. S.

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Nov. 11, 12; Dec. 3.

LYUS *v.* STEPNEY BOROUGH COUNCIL.

Emergency legislation — Street lighting — Metropolis — Obstruction — Sandbin on pavement in street—Erection under statutory authority—Prohibition of street lighting—Duty of local authority to render obstruction safe—Metropolis Management Act, 1855 (18 *&* 19 *Vict., c.* 120), *s.* 130—*London County Council* (*General Powers*) *Act,* 1928 (18 *&* 19 *Geo.* 5, *ch.* LXXVII.), *s.* 33—*Lighting* (*Restrictions*) *Order,* 1939 (*St. R. & O.* 1939, *No.* 1098), *para.* 1—*Costs—Appeal—Transcription of unnecessary documents—Directions to Taxing Master.*

In August, 1936, a local authority, acting under the powers conferred by s. 33 of the London County Council (General Powers) Act, 1928, caused a sandbin to be erected on the pavement of a street in their area. Under sub-s. 2 of that section they were not empowered "to hinder the reasonable use of a street by the "public or any person entitled to use the same." There was nothing in that Act which required that anything provided or maintained under their powers should be lighted in any particular manner, but the local authority were required by s. 130 of the Metropolis Management Act, 1855, well and sufficiently to light the streets in their area. On September 1, 1939, the Lighting (Restrictions) Order, 1939, was made by the Home Secretary, which prohibited the lighting of streets under s. 130 of the Act of 1855, and the lighting of streets in that area was discontinued as from September 1, 1939. On September 15, 1939, at 9 P.M. the plaintiff collided with the sandbin and sustained serious injuries. He brought an action against the local authority claiming damages for negligence and breach of statutory duty.

Held, by the Court of Appeal, that the sandbin, which was erected under statutory authority, when erected did not hinder any person in the use of the thoroughfare and did not constitute a private nuisance to any adjacent owner or occupier. The power to maintain the sandbin was distinct and separate from the power to provide it and did not involve any active operation on the part of the local authority. The Act under which the sandbin was erected and maintained did not impose any liability to light an obstruction lawfully provided, and there was nothing in the Act out of which such a duty could be spelt. The plaintiff therefore was not entitled to recover damages for his injuries from the local authority.

Great Central Ry. Co. v. *Hewlett* [1916] 2 A. C. 511; *Greenwood* v. *Central Service Co.* [1940] 2 K. B. 447; and *Wodehouse* v. *Levy* [1940] 2 K. B. 561, applied and followed.

Morrison v. *Sheffield Corporation* [1917] 2 K. B. 866 distinguished.

Decision of Humphreys J. [1940] 2 K. B. 662 reversed.

Observations on the transcription of unnecessary documents and copies thereof for the use of the Court of Appeal, and direction

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by the Court to the Taxing Master with reference to allowing the costs of such transcription and copies.

Appeal from a decision of Humphreys J. (1).

On or about August 24, 1936, the Stepney Borough Council caused a sandbin to be erected on the pavement in Settles Street, Stepney. It was erected under the powers conferred on the council by s. 33 of the London County Council (General Powers) Act, 1928. The Commissioner of Police was consulted with regard to the erection of the sandbin and he approved the dimensions and the site upon which it was erected. Until the time of the accident no question had been raised on the ground that the sandbin hindered the reasonable use of Settles Street by the public.

On September 1, 1939, the Lighting (Restrictions) Order, 1939, was made by the Home Secretary under the Defence Regulations. As the result of that Order the lighting of streets by lamps in the borough of Stepney under s. 130 of the Metropolis Management Act, 1855, was prohibited, and was discontinued by the council as from September 1, 1939.

On September 15, 1939, the plaintiff, Arthur George Lyus, at 9 P.M. when on his way home, collided with the sandbin and sustained serious injuries. The night was very dark, and Settles Street, a narrow road with high buildings on each side, was particularly so. The sandbin stood rather further back from the edge of the pavement than a lamp post would have done and was three feet ten inches in height.

The plaintiff issued a writ against the borough council claiming damages for personal injuries due to the negligence of the defendants and to their breach of statutory duty. The negligence alleged against the council was (*a*) the failure to light or keep lighted the sandbin or to take any steps or precautions to prevent persons lawfully using the footway in Settles Street from colliding with the sandbin or to notify them of the existence or position of the sandbin on the footway; (*b*) the failure to place a red lamp or other warning on or about the sandbin, or to mark the same in any way with whitewash or otherwise, or to place a watchman thereabout.

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(1) [1940] 2 K. B. 662.

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Humphreys J. held that the mere fact that a local authority were absolved from their statutory duty to light the streets did not absolve them from their common law duty to exercise reasonable care to see that persons using the highway were not inconvenienced or injured by carelessness on the part of the local authority, and that the defendants had been negligent in failing to whiten, or otherwise render visible the sandbin, so that the plaintiff was entitled to recover damages from the defendants.

The defendants appealed. The appeal was heard on November 11, 12, 1940.

Cecil Havers K.C. and *Harry Samuels* for the appellants. The decision of Humphreys J. was wrong. There was no common law obligation on the local authority to give any warning of the presence of the sandbin on the pavement. It was erected under statutory authority, and once properly erected under that authority—and there was no suggestion that it was not—there was no further duty on the defendants. The statute not only prescribed the size and position of these bins, but also directed that the Commissioner of Police for the Metropolis should be consulted, but refrained from giving any directions as to warning the public. There was no duty to light any particular part of this street as there was a statutory duty to light the whole street. That duty, however, was abrogated by the Lighting (Restrictions) Order, 1939. If it had been intended that consequential obligations should follow from those regulations it would have been so provided. There was no negligence on the part of the defendants. The accident took place only thirteen days after the outbreak of war, and the defendants acted with the greatest promptitude, for during that time they had painted white the ends of all the sandbins in the main streets. Settles Street was a minor street with which there had been no time to deal. If the standard laid down by Humphreys J. was correct, the only way in which the defendants could protect themselves would be to place a watchman at every sandbin, and, indeed, at every lamp post, for white paint soon gets dingy. The decision in *Morrison* v. *Sheffield Corporation* (1), upon which the learned judge in the Court below relied, is distinguishable in that the original erection of the particular kind of guard was not authorized by the statute. Alternatively, that case was wrongly decided.

The ratio decidendi of *Baldock* v. *Westminster City Council* (2), where the council were held liable to the plaintiff for their negligence in failing to maintain a danger lamp on a street refuge, was that the council had assumed the duty of lighting the refuge and had failed to perform that duty. Bankes L.J. said that " it may well be that it was competent for the local "authority to have extinguished all the lights upon shelters "without incurring liability to anybody." The council, however, continued to light the refuges after the Lighting Regulations had taken away any obligation to light streets. In that case it was put that what the council had done was in the nature of a trap as the lighting was erratic. In *Sheppard* v. *Glossop Corporation* (3) the corporation acting under s. 161 of the Public Health Act, 1875, had placed a light on a wall, but extinguished it at 9 P.M. every night. The plaintiff as a result of the lamp having been extinguished was injured. It was held that the corporation were not liable to the plaintiff because s. 161 of the Public Health Act, 1875, conferred upon local authorities a discretion, but imposed on them no obligation to light the streets in their district. The decision of the House of Lords in *Great Central Ry. Co.* v. *Hewlett* (4) shows that there was no obligation upon the local authority to take any active steps in the maintenance of the sandbin on the change of circumstances due to the Lighting (Restrictions) Order. The present case is governed by the recent decisions of the Court of Appeal in *Greenwood* v. *Central Service Co.* (5) and *Wodehouse* v. *Levy.* (6) It was held in those cases that a local authority which had erected and maintained a street refuge in the highway under s. 108 of the Metropolis Management Act, 1855, was required by s. 130 of that Act to keep the street

(1) [1917] 2 K. B. 866.

(2) (1918) 120 L. T. 470; 88 L. J. (K. B.) 502.

(3) [1921] 3 K. B. 132.

(4) [1916] 2 A. C. 511.

(5) [1940] 2 K. B. 447.

(6) [1940] 2 K. B. 561.

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well and sufficiently lighted. But that statutory duty having been abrogated during the period of the war by the Lighting (Restrictions) Order, 1939, no other duty to illuminate the refuge rested on the local authority either at common law or by statute.

Gilbert Beyfus K.C. and *Rhymer* for the respondent. The decision in *Wodehouse* v. *Levy* (1) does not cover the present case. There is nothing in the present case to do with the duty of a local authority to light the streets. The council having erected an obstruction in the street was under a duty to see that the obstruction was as little danger to members of the public as diligence could make it. Although the sandbin was properly erected under the statute of 1928 the council is deprived of its defence under sub-s. 1 of s. 33 by reason of the provision in sub-s. 2 that nothing shall empower a borough council to hinder the reasonable use of a street by the public. The erection of this sandbin hindered the reasonable use of Settles Street by the public. The plaintiff relies upon the principle of law stated by Lord Blackburn in *Geddes* v. *Proprietors of Bann Reservoir* (2) where he said: "For I "take it, without citing cases, that it is now thoroughly well "established that no action will lie for doing that which the "legislature has authorized, if it be done without negligence, "although it does occasion damage to anyone; but an action "does lie for doing that which the legislature has authorized, "if it be done negligently. And I think that if by a reasonable "exercise of the powers, either given by statute to the "promoters, or which they have at common law, the damage "could be prevented it is, within this rule, 'negligence' not "to make such reasonable exercise of their powers." The same principle was also enunciated by Lord Parker of Waddington in *Great Central Ry.* v. *Hewlett* (3) as follows: "It is undoubtedly a well-settled principle of law that when "statutory powers are conferred they must be exercised with "reasonable care, so that if those who exercise them could "by reasonable precaution have prevented an injury which

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(1) [1940] 2 K. B. 561.
(2) (1878) 3 App. Cas. 430, 455.
(3) [1916] 2 A. C. 511, 519.

"has been occasioned, and was likely to be occasioned, by their "exercise, damage for negligence may be recovered." In the present case the local authority did nothing to maintain the sandbin, which was an obstruction in the street, in a visible condition. There was a common law duty upon the local authority to act so as not to cause needless injury to members of the public. "Maintain" means "keep" the sandbin in the place where it was erected. Maintaining the sandbin in the statutory darkness caused by the blackout means taking such reasonable precautions as to make the obstruction of the sandbin visible. One way to perform that duty was to light the sandbin, another way was to whitewash the sandbin or to paint it with a luminous paint. *Great Central Ry.* v. *Hewlett* (1) does not decide any question of principle; it merely decided the meaning of a section of a particular statute. The decision has no general bearing at all. That was the construction placed upon that decision by Lord Reading C.J. in *Morrison* v. *Sheffield Corporation.* (2) It had been held that the posts and gates which the railway company had erected were illegal and a nuisance, the railway company obtained a special Act of Parliament which made the posts and gates legal by authorizing the company to maintain them. If circumstances change so that what formerly was not dangerous afterwards becomes dangerous there is a duty on the local authority to take reasonable precautions against that danger. Lord Sumner in *Hewlett's* case (3) draws a distinction between a specific and precise authority to maintain the status quo and an authority given in general terms, in which case the authority must be used with reasonable care. It is quite clear that if a person places an unlighted obstruction in the roadway, even under statutory powers, he will be liable to a person injured by the obstruction. If that which was placed in the roadway was formerly safe, but subsequently becomes dangerous, a duty is imposed upon the persons who originally placed the thing in the roadway to take reasonable steps to prevent it from becoming a danger: *Great Central*

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(1) [1916] 2 A. C. 511.
(2) [1917] 2 K. B. 866, 871.
(3) [1916] 2 A. C. 511, 523.

Ry. v. *Hewlett* per Lord Parker (1) and Lord Wrenbury (2); see also *Morrison* v. *Sheffield Corporation.* (3) Scrutton L.J. in *Baldock* v. *Westminster City Council* (4) said that his recollection was that the guard which was placed round the tree in *Morrison* v. *Sheffield Corporation* (3) was a proper guard when it was erected, but that it became an improper guard owing to the blackout. Lord Reading C.J. in *Morrison's* case (5) said: "I have come to the conclusion that the duty "was continuing; that the degree of care required was not "exhausted by erecting the guards so as to be reasonably safe "for the protection of the public at the time of their erection; "and that the duty continued so to keep them as not to be "dangerous to the public using the highway." Lord Reading had said previously (6) "but it is contended that, when, as "in the present case, it cannot be suggested that there was "any nuisance or want of reasonable care before April 3, "when the order forbidding lighting was issued, there is no "greater duty cast upon the authority to take further "precautions." That is the same contention as is being used against the plaintiff in the present case, but Lord Reading said with reference to it: "I am unable to accept "that view of the law." In *Sheppard* v. *Glossop Corporation* (7) Bankes L.J. referring to *Lamley* v. *East Retford Corporation* (8) said (9): "The defendants in that case had placed a post in "the middle of a public highway, and the question was whether "they were liable for failing to light that portion of their "district. Their liability arose not from a mere omission to "light their district efficiently, but from their act in placing "in the highway a post which unless lighted was a danger "to passers by." That learned judge there exactly puts the contention for the plaintiff in the present case. The defendants have erected a sandbin on the pavement and there is a duty upon them to light it or to warn passers-by of the erection of the sandbin. It was erected under the general powers given to the local authority by the statute and therefore there was a duty on the local authority to see that it did not become a danger. In *Polkinghorn* v. *Lambeth Borough Council* (1) it was held by the Court of Appeal that a local authority which had erected a post in a street but failed to light it, was liable in damages to the plaintiffs through having failed in their contractual obligation to keep the post lighted. The majority of the Court of Appeal based their decision upon a breach by the defendants of their common law duty to keep the post lighted and so prevent it from becoming a danger. The defendants acted wrongly in rendering the obstruction in the main road visible before doing anything to the obstructions in the minor road. They ought to have adopted temporary measures to render the sandbin visible before finishing their work of making the obstructions in the main roads visible. The defendants having taken upon themselves the duty of rendering obstructions visible, ought to have done the work properly.

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(1) [1916] 2 A. C. 511, 519.
(2) Ibid. 525.
(3) [1917] 2 K. B. 866.
(4) 120 L. T. 470, 472.
(5) [1917] 2 K. B. 871.
(6) (1917] 2 K. B. 870.
(7) [1921] 3 K. B. 132.
(8) (1891) 55 J. P. 133.
(9) [1921] 3 K. B. 139.

Cur. adv. vult.

1940. Dec. 3. The judgment of the Court (SCOTT, MACKINNON and LUXMOORE L.JJ.) was read by LUXMOORE L.J. On or about August 24, 1936, the Stepney Borough Council (hereinafter called " the council ") caused a sandbin to be erected on the pavement in Settles Street, Stepney. It was erected under the powers conferred on the council by s. 33 of the London County Council (General Powers) Act, 1928. This section provided by sub-s. 1 : " A borough council may "provide and maintain in upon or under any street vested "in or repairable by them orderly bins or other receptacles for "the collection and temporary deposit of street refuse and "waste paper and the storage of sand grit shingle or cinders "of such dimensions and in such positions as the borough "council after consultation with the Commissioner of Police "of the Metropolis may from time to time determine." Sub-sect. 2 : " Nothing in this section shall empower a borough "council to hinder the reasonable use of a street by the public

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(1) (1938) 54 Times L. R. 345.

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"or any person entitled to use the same and a borough council "shall not exercise their powers under this section in such a "way as to create a nuisance to any adjacent owner or "occupier." There is nothing in this section or the Act which requires that anything provided or maintained under its powers should be lighted or distinguished in any particular manner or at all, but the council was required by s. 130 of the Metropolis Management Act, 1855, well and sufficiently to light the streets in the area under its jurisdiction.

It is common ground that the Commissioner of Police was consulted with regard to the erection of the sandbin and that he approved its dimensions and the site upon which it was erected. Until after the accident to which reference is made later no objection was raised on the ground that the sandbin hindered the reasonable use of Settles Street by the public or any person entitled to use it, or that the presence of the sandbin on the pavement created a nuisance to any adjacent owner or occupier.

On September 1, 1939, more than three years after the sandbin was erected, Order No. 1098 of the Statutory Rules and Orders, 1939, known as the Lighting (Restrictions) Order, 1939, was made by the Secretary of State for the Home Department under the Defence Regulations, 1939. So far as is material it provided by para. 1: "Subject as hereinafter "provided, no person shall during the hours of darkness cause "or permit . . . . (*b*) any light . . . . to be displayed," while by para. 4 it provided that "Paragraph 1 of this Order "shall not apply to the following lights for the guidance of "traffic in roads." Then follow descriptions of a number of different classes of lights, the only one of which need be referred to is contained in sub-para. (*d*): "Lamps indicating "obstructions upon or near the carriageway of any road "provided that they are of candle power not exceeding "1.0, and so screened as to prevent light being thrown "upwards and any appreciable glow being produced on the "road surface."

As the result of this Order the lighting of streets by lamps in the borough of Stepney under s. 130 of the Metropolis

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Management Act, 1855, was prohibited and was discontinued by the council as from September 1, 1939.

On September 15, 1939, the plaintiff at 9 o'clock in the evening, when on his way home, collided with the sandbin and sustained serious injuries. It is agreed that the night of September 15 was very dark.

On March 7, 1940, the plaintiff issued a writ in the King's Bench Division against the council claiming damages for negligence and for breach of statutory duty. The negligence alleged against the council was the failure (*a*) to light or keep lighted the sandbin or to take any steps or precautions to prevent persons lawfully using the footway in Settles Street from colliding with the sandbin or to notify them of the existence or position of the sandbin on the footway; (*b*) to place a red lamp or other warning on or about the sandbin or to mark the same in any way with whitewash or otherwise or to place a watchman thereabout. The plaintiff also alleged that the council placed and maintained upon the footway an obstruction which was a nuisance to persons lawfully using the footway at night unless lighted, or the existence thereof was otherwise notified.

The council denied that it was guilty of negligence in the maintenance of the sandbin and pleaded that it was under no obligation to keep the sandbin lighted, or to place a red lamp thereon, or to provide a watchman therefor. The council further denied that the sandbin was a nuisance.

The action was tried by Humphreys J. without a jury on August 19, 1940. At an early stage during the hearing the learned judge permitted the council to amend its defence by pleading that: "The sandbin was erected by the council "under the powers conferred on it by s. 33 of the London "County Council (General Powers) Act, 1928, which powers "were duly conformed to and exercised by it and the council "was under no legal duty or obligation by the terms of the "statute or otherwise to illuminate or paint or whitewash "the sandbin but was entitled to maintain it without any "light thereon pursuant to the terms of the statute and without "placing a watchman thereabout, or otherwise giving warning "of its presence."

The learned judge held that, although in the circumstances the council was absolved from the statutory duty of lighting the streets in the borough of Stepney imposed on it by s. 130 of the Metropolis Management Act, 1855, that fact did not absolve it from any other duty which the common law might impose upon it to see that persons who are walking about the streets are not unduly inconvenienced or exposed to accidents by any carelessness on the part of the council.

The evidence before the learned judge established that on or about August 18, 1939, in compliance with a memorandum from the Home Secretary, the council began to take steps to paint with white marks the various obstructions, including sandbins, placed in the streets of the borough in order to prevent persons using the streets in the dark from injuring themselves by colliding therewith. The council started by painting the obstructions in the more important thoroughfares first and had not reached Settles Street, which is admittedly not one of these thoroughfares, by September 15, 1939.

The learned judge held that the council was guilty of negligence in not taking steps between August 18, 1939, and September 15, 1939, to call attention to the existence of the sandbin in question by putting a splash of white paint upon it. Humphreys J., having held that the council was negligent and therefore liable to the plaintiff for the accident which he suffered, fixed the damages at 190*l*. and gave judgment for the plaintiff for that sum, and costs.

The council has appealed to this Court and asks that the judgment of Humphreys J. may be set aside, that judgment may be entered in the action for the council, and that the plaintiff may be ordered to pay the council's costs of the action. The appeal admittedly is not directed to the quantum of damage but is confined to the question of the liability of the council in law.

The council contended that as it was prohibited from lighting the streets within the borough under the provisions of s. 130 of the Metropolis Management Act, 1855, there was no

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duty on it to warn the plaintiff or any other person using Settles Street of the existence of the sandbin or of its position because it had been erected by the council with all reasonable care under the provisions of s. 33 of the London County Council (General Powers) Act, 1928, and that the council was entitled to maintain it in the position in which it had been erected under the express power to maintain conferred by the same section. The council further contended that the sandbin was not a nuisance and that it was under no duty and had not therefore been guilty of negligence in failing to paint it or take other steps to warn the plaintiff of its existence and position.

As already stated, Humphreys J. held that the sandbin was placed in Settles Street in accordance with the provisions of the appropriate statute and that its existence was not a nuisance, but he went on to hold that the statute did not absolve the council from the obligation of using reasonable care to see that what was an obstruction, although a lawful obstruction, did not cause injury to the public, who have the primary right of using Settles Street for the purpose of passing along it without hindrance.

The first question to be considered is whether the council was under any such obligation. The question has been frequently considered and a number of cases was cited to the learned judge. He expressed the opinion that the decisions were in conflict and in the result refused to follow a number of them, including two recent decisions of this Court, namely, *Greenwood* v. *Central Service Co.* (1) and *Wodehouse* v. *Levy.* (2) The learned judge purported to base his judgment on an earlier decision of this Court in *Morrison* v. *Sheffield Corporation* (3), which was not cited either in *Greenwood* v. *Central Service Co.* (1) or in *Wodehouse* v. *Levy.* (2)

In both *Greenwood* v. *Central Service Co.* (1) and *Wodehouse* v. *Levy* (2) the local authority had erected an obstruction in the highway under the express powers conferred on it by s. 108 of the Metropolis Management Act. No special duty was imposed by that statute to light either obstruction, but by s. 130 a general duty was imposed on the local authority to cause the streets within the district to be well and sufficiently lighted. This, as was pointed out by Bankes L.J. in *Baldock* v. *Westminster City Council* (1), included a duty to provide sufficient light to indicate the position of any obstruction which the local authority placed in the street under the powers conferred by s. 108. It is true that s. 108 does not contain any such provision as is to be found in sub-s. 2 of s. 33 of the London County Council (General Powers) Act, 1928, to which reference has already been made, but we do not think that the presence of such a provision in the latter Act can affect the position of the council; it affords nothing more than a warning that, in exercising the power of placing in a thoroughfare that which must of necessity be an obstruction, the user of the thoroughfare, as such, is not to be unreasonably interfered with, nor shall a private nuisance be created.

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(1) [1940] 2 K. B. 447.
(2) [1940] 2 K. B. 561.
(3) [1917] 2 K. B. 866.

In our judgment, the question whether the erection of the sandbin will hinder the reasonable user of the street by the public or by any other person is one to be considered at the time when the sandbin was erected, and if at that time there was no such hindrance it is difficult to see how at some later date it can be said that the sandbin has become a hindrance to the user of the street. In our judgment, the existence of sub-s. 2 of the said section does not afford any ground for distinguishing the present case from the decisions in *Greenwood* v. *Central Service Co.* (2) and *Wodehouse* v. *Levy* (3) respectively. Unless it can be shown that the two last-mentioned cases are in conflict with some other decision either of this Court or of the House of Lords, we think that we are bound to follow those cases.

Humphreys J., however, thought that those cases were in conflict with the decision in *Morrison* v. *Sheffield Corporation.* (4) The question is whether he was right in so thinking. In his judgment, the learned judge referred to the following sentence in the speech of Lord Parker in *Great Central Ry. Co.* v.

(1) 120 L. T. 470, 471.

(2) [1940] 2 K. B. 447.

(3) [1940] 2 K. B. 561.

(4) [1917] 2 K. B. 866.

Hewlett. (1) " It is undoubtedly a well-settled principle of law "that when statutory powers are conferred they must be "exercised with reasonable care, so that if those who exercise "them could by reasonable precaution have prevented an "injury which has been occasioned, and was likely to be "occasioned, by their exercise, damage for negligence may be "recovered." Humphreys J. appears to have thought that although when the sandbin was erected in 1936 there was no reasonable or foreseen prospect of danger, yet the council would be liable to take some further steps at some subsequent date to provide for what might happen if the existing circumstances should thereafter change. It seems to us that the learned judge has failed to appreciate that the council, in providing the sandbin in the first instance, was exercising a different power from that which it exercised after its erection had been completed. The first power exercised was to provide the sandbin, the second was to maintain it. The difference between these two powers is manifest from a perusal of the speeches of Lord Parker and Lord Wrenbury in *Great Central Ry. Co.* v. *Hewlett.* (2)

Before dealing with that case it is important to bear in mind its material facts. The Great Central Railway Co. had in the year 1901 erected in the public highway certain gate posts from which collapsible steel gates could be run across the road and so close the entrance to a station yard belonging to the company. The posts were erected by the railway company in contravention of their special Act and were held by the Court to be an obstruction to the highway. In 1902 the railway company obtained an Act which empowered them to maintain the posts and gates and to replace them when necessary on the same site. A taxicab driver while lawfully driving his taxicab on a dark night in the year 1915 along the public highway into the station yard, collided with one of the posts, which was practically invisible owing to the darkening of the street in compliance with the Reduction of Lighting Regulations then in force. The taxicab driver sued the railway company for damages for negligence and failed.

(1) [1916] 2 A. C. 511, 519.

(2) Ibid. 519, 524.

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Lord Parker pointed out that, in considering whether the company had been negligent or not, it was necessary to consider the nature of the statutory power which was being exercised by the company, and that the only power which could be considered was the power to "maintain." He asked what is the meaning of the word "maintain" as used in the material section of the Act (s. 31 of the Great Central Railway Act, 1902) and answered the question by saying (1): "Negatively "it relieves the company from any obligation which might "otherwise have existed to remove the posts. Positively it "enables the company to do what is necessary to keep the "posts there. It is only in its negative aspect that the "company can be said to have been exercising this power. "It has, in fact, done nothing at all. Is the principle relied "on really applicable under these circumstances? In my "opinion it is not. It seems to me that for its application the "company must be doing something involving risk to others "without taking reasonable precautions to obviate such risk. "Here the risk arises, not from what the company is doing, "but from the existence of the gate posts legalized by the Act "coupled with the diminution of light necessitated by the "exigencies of the war. It is reasonably certain that the "Legislature was, under the circumstances which prevailed "when the Act was passed, satisfied that there was no "appreciable risk to the public, otherwise the legalization of "the obstruction without expressly providing precautions to "obviate the risk would be inexplicable. The change of "circumstances cannot be relevant on any question of construction, and in my opinion the Act does not impose on "the company any such obligation as suggested by the "respondents, nor can any such obligation be based on the "principle relied on."

Lord Wrenbury said (2): "In the year 1902 the appellants "obtained an Act which authorized them to maintain the post "and from time to time when necessary to renew and replace "it in the same site and position. The authority was not an "authority to do anything actively (except as regards renewal

(1) [1916] 2 A. C. 519.

(2) Ibid. 524.

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"and replacement, upon which nothing turns), but a mere "authority to leave things alone. The word 'maintain' "in the section means no more than 'not remove.' The "result is that that which theretofore was an illegal "obstruction became a legal obstruction. For greater "accuracy the word 'obstruction' (which implies something "which improperly interferes with the rights in the highway) "ought to be dropped. The post was no longer an obstruction "to the highway. The legal highway was a road in which "there stood a post. Whoever used the highway must use "it as a highway with a post in it." And (1) "No one disputes "the general proposition that a person who is clothed with "a statutory power to do an act must in doing it exercise "reasonable care to prevent injury to others. But in the "present case the statutory authority was not to do an act, "but to leave things as they were. In 1902 the post was in "the highway illegally. The statute of 1902 said you may "leave it where it is. It thus became a post in the highway "legally. The authority was not an authority to be active, "but to be passive. The Act merely released an obligation, "namely, the obligation not to obstruct the highway. From "that state of facts no duty flows. If there be duty or "authority to do an act it is possible to be negligent in doing "it. If there be duty or authority to do or to abstain from "doing an act according to circumstances it is possible to "be negligent in doing or abstaining from doing it. But "if the duty or authority be simply not to do an act— "merely to leave things as they are—it is impossible to "be negligent in not doing anything. The last is the "present case. It is said however that 'maintain' is not "merely passive, but implies also something active, "namely, doing acts of maintenance. This may be true, "but it is not necessary to inquire whether it is or not. "For the words of the statute, 'renew and replace,' "plainly authorize affirmatively such acts to be done. "I agree that in acts of renewal or replacement the "appellants might be guilty of negligence. But they have

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(1) [1916] 2 A. C. 525.

"done no such acts. Their only act has been to leave the "post as it was."

Apply the passages to which reference has been made to the present case. Here the sandbin was provided by the council. It cannot be suggested that there was anything unreasonable with its dimensions when it was provided in 1936, or that it hindered any person in the use of the thoroughfare or that it constituted a private nuisance to any adjacent owner or occupier. Indeed as already stated, the judge has held to the contrary. After it had been erected it became an authorized obstruction of Settles Street and one which the council were empowered to maintain.

The power to maintain is distinct and separate from the power to provide and, as pointed out by Lord Parker and Lord Wrenbury in *Great Central Railway Co.* v. *Hewlett* (1), does not involve any active operation on the part of the council. The Act itself does not impose any liability to light an obstruction lawfully provided and there is nothing in the Act out of which such a duty can be spelt.

Of course, if the sandbin provided was not in accordance with the requirements of the Act, e.g., if it was furnished with a number of spikes projecting over the thoroughfare the case would be different, for the sandbin provided would not be a reasonable sandbin and consequently would not be within the Act and there would accordingly be no statutory power to maintain it.

An example of this class of case is to be found in *Manley* v. *St. Helens Canal and Railway Co.* (2), where the power was to make and to maintain a sufficient swivel bridge over a canal. The plaintiff recovered damages for injuries caused by falling through a gap in the highway over the swivel bridge caused by opening it for traffic. As Lord Parker pointed out in *Great Central Railway Co.* v. *Hewlett* (3), when commenting on *Manley* v. *St. Helens Canal and Railway Co.* (2): "It," i.e., the swivel bridge—" was not a work expressly authorized "or sanctioned by the Legislature. The case, therefore,

(1) [1916] 2 A. C. 511, 519, 524.
(2) (1858) 2 H. & N. 840.
(3) [1916] 2 A. C. 511, 521.

"cannot be used as an authority for the proposition that a "mere power to maintain what the Legislature has expressly "sanctioned involves any obligation towards the public."

In our opinion, it is on the same basis that the decision in *Morrison* v. *Sheffield Corporation* (1) can properly be distinguished from *Greenwood* v. *Central Service Co.* (2) and *Wodehouse* v. *Levy.* (3) The facts in *Morrison* v. *Sheffield Corporation* (1), were as follows: A local authority purporting to act in pursuance of the powers conferred on it by s. 43 of the Public Health Acts Amendment Act, 1890, planted trees in certain of the highways in the area under its jurisdiction and surrounded each tree with an iron spiked guard. After the guards had been erected an order was promulgated under the Defence of the Realm Regulations by which all street lights in the area were ordered to be extinguished at a certain hour. The plaintiff, who was crossing one of the streets where the trees had been planted on a dark night after the prescribed hour and when the lights had been extinguished, came in contact with one of the spiked guards and was seriously injured by the spike. The plaintiff sued for damages in an action tried by Rowlatt J. with a jury. The jury found in favour of the plaintiff and gave a verdict for a substantial sum by way of damages. The Corporation appealed. The Court of Appeal upheld the decision in favour of the plaintiff.

We agree that it is not easy to understand some passages in the various judgments, especially that in which Lord Reading C.J., after referring to *Great Central Railway Co.* v. *Hewlett* (4), stated (5) that the general principle of law laid down in that case—i.e., *Great Central Railway Co.* v. *Hewlett* (4) —was not in controversy, and added that the degree of care required from the council was not exhausted by erecting the guards so as to be reasonably safe for the protection of the public at the time of their erection, and that the duty continued so to keep them as not to be dangerous to the public

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(1) [1917] 2 K. B. 866.
(2) [1940] 2 K. B. 447.
(3) [1940] 2 K. B. 561.
(4) [1916] 2 A. C. 511.
(5) [1917] 2 K. B. 871.

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using the highway. This passage is easily explained if it is based on the fact that the guards with spikes, which were reasonably safe while street lighting was maintained, were not, by reason of the existence of the spikes, guards authorized by the statute. That the guards with spikes were not so authorized was, we think, recognized by Scrutton L.J., who was a party to the decision in *Morrison* v. *Sheffield Corporation* (1), in the later case of *Sheppard* v, *Glossop Corporation* (2), in the following passage of his judgment: "*Morrison* v. *Sheffield Corporation* (1) is another case of "creating a danger in a highway. The corporation with a "view to improving the amenities of Sheffield, planted trees "in the streets. They then placed round the trees railings "with spiked posts bent outwards to prevent boys from "climbing. During the period of the Zeppelin raids on "dark nights, when the lights in Sheffield were put out in "pursuance of powers given by the Defence of the Realm "Regulations, the plaintiff walked into the obstruction and "damaged his eye. There the local authority had placed "the danger in the street with no sufficient guard."

If, however, *Morrison* v. *Sheffield Corporation* (1) is not properly distinguishable from the other cases on the grounds suggested and is in conflict with them, we think that this Court is bound in this case, as it was in *Greenwood* v. *Central Service Co.* (3) and in *Wodehouse* v. *Levy* (4) to follow the decision of the House of Lords in *Great Central Railway Co.* v. *Hewlett.* (5)

For these reasons we think that the learned judge came to a wrong conclusion with regard to the law, and consequently this appeal ought to be allowed.

Although, in view of the conclusion at which we have arrived, it is not essential to decide the point, we think that the learned judge was also in error in holding that on the evidence before him the council was guilty of any negligence in not distinguishing obstructions in subsidiary streets until after those in the principal thoroughfares had been distinguished. The time at the disposal of the council was in reality only fifteen days, for we do not think it can properly be said that, if the council was under a duty to distinguish obstructions so that they might be visible in the event of a black-out Order, the council ought to have started the work necessary for that purpose before the declaration of war.

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(1) [1917] 2 K. B. 866.
(2) [1921] 3 K. B. 132, 148.
(3) [1940] 2 K. B. 447.
(4) [1940] 2 K. B. 561.
(5) [1916] 2 A. C. 511.

In the result the appeal must be allowed, with costs here and below.

There is, however, one matter to which it is necessary to direct particular attention. The evidence called at the hearing was mainly directed to the question whether the plaintiff's illness was the result of the accident which he suffered or not, and also to the quantum of damage, matters not in dispute in this Court—yet the whole of the evidence given in the Court below was transcribed and three copies of the transcript made for the use of this Court. Further, the whole of the correspondence passing between the parties and their respective solicitors between October 7, 1939, and August 9, 1940, covering thirty-six pages, was copied and three bundles were supplied for the use of the Court. It seems plain that most of such transcription and copying was entirely useless. In the circumstances we think it right that a special direction should be given to the Taxing Master that, in taxing the costs of the appeal, he should disallow the successful appellants all costs incurred by reason of the obtaining of the transcript and the copies thereof so far as such evidence was unnecessarily transcribed and copied, and that a similar direction should be given with regard to the copies of the correspondence.

Appeal allowed.

Solicitor for appellants: *J. E. Arnold James, Town Clerk, Stepney.*

Solicitors for respondent: *J. Tickle & Co.*

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Dictum of du Parcq, L.J., at pp. 164, 165, *applied.* Harrison *v.* Nat. Coal Board. [1949] 2 All E.R. 58.

Distinguished. Harrison *v.* National Coal Board. [1950] 1 All E.R. 171.

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Nov. 19, 20, 21, 22, 25; *Dec.* 10.

YELLAND AND OTHERS *v.* POWELL DUFFRYN ASSOCIATED COLLIERIES, LIMITED.

Mine—Explosion—Fatal injuries to workmen—Breach of statutory regulation by servant of mine-owner—Duty of mine-owner to comply with and to enforce statutory regulations—Mine-owner's duty delegated to servant—Servant's breach of regulation in law the mine-owner's breach of duty—Common employment—Whether "reasonably "practicable to avoid or prevent the breach"—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 102, sub-s. 8—General Regulations made under s. 86 of Act, (St. R. & O., No. 748 of 1913), No. 117 (1).

Under reg. 117 (1) of the General Regulations made under the Coal Mines Act, 1911, it is the duty of the owners of a mine not only to enforce but to comply with those regulations. A limited company can only act in certain respects by its agents or servants, and if it delegate the performance of its statutory duty to a servant, a breach of that duty by the servant is in law the company's own breach and it cannot avail itself of the doctrine of common employment as against claims by other servants or their representatives. Moreover s. 102, sub-s. 8 (2), of the Act of 1911, is not applicable in such circumstances, for it is not possible for the company to say that it was not reasonably practicable to avoid or prevent a deliberate breach by the servant or agent to whom it has specially delegated the duty.

Defendants' Appeal from a judgment of Lewis J., sitting without a jury, at Cardiff Assizes.

Claims brought under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934.

The material facts, shortly stated, were as follows: At about 6 a.m. on September 6, 1938, at the end of the night shift, an explosion occurred in the Gorllwyn Fach seam of the Tirherbert Colliery, and as a result four men lost their lives and two others were injured. The men killed were David John Yelland and Daniel Davies, coal cutters, each aged twenty-four, John Sydney Williams, a collier, aged forty-two, and John Arwyn Jones, aged twenty-eight, the assistant electrician of the mine. Actions were brought against the defendants by the representatives of each of the deceased workmen. The actions of Mrs. Yelland, Mrs. Davies and Mrs. Williams were consolidated, and by agreement the action brought by Mrs. Jones was tried at the same time.

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(1) St. R. & O., No. 748 of 1913, General Regulations, reg. 117:—"It shall be the duty of the "mine-owner, agent and manager "to comply with and enforce the "following regulations, and it "shall be the duty of all workmen "and persons employed to con"duct their work in accordance "with the regulations."

(2) Coal Mines Act, 1911, s. 102, sub-s. 8:—"The owner of a mine "shall not be liable to an action "for damages as for a breach of "statutory duty in respect of any "contravention of or non-com"pliance with any of the provis"ions of this Act if it is shown "that it was not reasonably "practicable to avoid or prevent "the breach."

It was found by the learned judge below, and accepted by the Court of Appeal, that at the time of the explosion John Arwyn Jones was employed in testing the electric cable for a fault in the circuit, and that the disaster was caused by his neglect to comply with regs. 131 (*e*) and 132 (iii.) of the General Regulations, by seeing that the electric current was first switched off, and the part of the cable affected made dead, and kept dead, until the defect had been remedied. Also, that Jones, instead of using a safety apparatus, called a "megger," which had been supplied by the defendants, improperly and contrary to orders was carrying out the test by means of two bulbs and a piece of flex, and so caused a spark which ignited the gas.

Lewis J. came to the conclusion, however, that there was a sudden and abnormal inrush of gas into the seam from an unused working beneath, and that although the ventilation in the seam was adequate for normal requirements, it was not adequate to render the gas which in fact accumulated "harmless" within the meaning of s. 29, sub-s. 1, of the Act of 1911. (1) He therefore held that the defendants had committed a breach of their statutory duty, and could not rely on the defence of common employment. He awarded

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(1) Coal Mines Act, 1911, s. 29, sub-s. 1 :—"An adequate amount "of ventilation shall be constantly "produced in every mine to dilute "and render harmless inflammable and noxious gases to such "an extent that all shafts, roads, "levels, stables and workings of "the mine shall be in a fit state "for working and passing therein, ". . . . (*b*) provided always "that no person shall be liable in "respect of any contravention of "or failure to comply with the "provisions of this section if he "shows that the ventilation was "interrupted in consequence of "an accident, and that no persons

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damages to Mrs. Yelland, Mrs. Davies and Mrs. Williams, but dismissed the claim of Mrs. Jones.

The defendants now appealed. The appeal was heard on November 19, 20, 21, 22, 25, 1940.

Comyns Carr K.C., *Joshua Davies K.C.*, and *Rowe Harding* (for *Edmund Davies*, on war service) for the defendants. The decision of the Court below was wrong. The defendants were not liable. By the Coal Mines Regulation Act, 1887, s. 49, general rules were provided to procure safety in mines, but it was enacted that they were to be observed " so far as " is reasonably practicable," and, therefore, were not absolute: *Butler* (*or Black*) v. *Fife Coal Co.*, per Lord Kinnear. (1) Furthermore, s. 50 of the Act, which made contravention of or non-compliance with the rules an offence, provided the mine-owner with a defence to a charge under the section if he could prove that he " had taken all reasonable means . . . . "to prevent such contravention or non-compliance." In the Coal Mines Act, 1911, many matters relating to safety which were dealt with in the rules under s. 49 of the Act of 1887 are made the subject-matter of separate sections in Part II. of the Act, and that group of sections is not introduced by any such words as " so far as is reasonably practicable," but those sections are all subject to s. 75 of the Act, which contains a provision affording a defence to the mine-owner in the same terms as s. 50 of the Act of 1887. The duty to observe the rules being established, the civil liability of a mine-owner for a breach of the rules is clear: *Britannic Merthyr Coal Co.* v. *David* (2); *Butler* (*or Black*) v. *Fife Coal Co.*, per Lord Kinnear (1); *Watkins* v. *Naval Colliery Co.* (1897), *Ld.*, per Viscount Haldane (3); *Lochgelly Iron & Coal Co.* v. *M'Mullan*, per Lord Atkin and Lord Warrington (4); but the same defence is open to a mine-owner in a civil action as is open to him

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" were employed in any part of " the mine in which an adequate " amount of ventilation was not " being produced, except such " persons as it was necessary to " employ in that part of the mine " for the purpose of restoring the " ventilation."

(1) [1912] A. C. 149, 160, 165.

(2) [1910] A. C. 74.

(3) [1912] A. C. 693, 702.

(4) [1934] A. C. 1, 8, 13.

under s. 75 of the Act of 1911 on a criminal proceeding. In addition, s. 102, sub-s. 8, provides that "the owner of a mine "shall not be liable to an action for damages as for breach "of statutory duty in respect of any contravention of or "non-compliance with any of the provisions of this Act if it "is shown that it was not reasonably practicable to avoid or "prevent the breach." Moreover, a breach of a duty imposed by the Act of 1911 is statutory negligence: *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan*, per Lord Wright (1); see also *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (2); and a charge of such a breach can be rebutted by proof that the mine-owner was not guilty of any negligent conduct. All these defences were available to the defendants and were substantiated by them. Sect. 29 of the Act of 1911, which deals with ventilation, has regard only to the usual and normal condition of a mine, and not to special and abnormal conditions such as existed here. The section does not, therefore, apply to such a case as the present, because there is no evidence to show that the mine was not usually and normally a safe and fit place in which to work. All that was proved was that at the particular time of the accident and in the abnormal circumstances then existing, it was not a safe place in which to make sparks. The terms of s. 29 make it clear that it is impossible to keep a mine completely free from gas. On the evidence, therefore, it appeared that the defendants had taken all reasonable means to comply with the section, or, alternatively, it was not, within s. 102, sub-s. 8, "reasonably "practicable to avoid or prevent" a breach of the section, since it is impossible to devise a system of ventilation so perfect as to meet all eventualities, just as it is impossible to devise a method of fencing machinery which is capable of meeting every circumstance: *Coltness Iron Co.* v. *Sharp* (3); *Wilsons and Clyde Coal Co., Ld.* v. *English* (4) was also referred to.

Gilbert Paull K.C., *Griffith Williams* and *F. D. L. McIntyre* for the respondents. The trial judge has found that Jones, the assistant electrician, committed breaches of

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(1) [1934] A. C. 1, 23.
(2) [1940] A. C. 152.
(3) [1938] A. C. 90.
(4) [1938] A. C. 57.

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Nos. 131 (*e*) and 132 (iii.) of the General Regulations, which must be read as if they were part of the Coal Mines Act, 1911. These statutory duties are imposed on the mine-owners and their servants. The breach by Jones was a breach by the mine-owners themselves, for being a limited liability company they could only perform these duties by their electrical staff. Jones was the mine-owners' agent to perform their duties. The mine-owners, themselves, therefore, have failed to comply with these regulations within the meaning of the first part of s. 90 of the Coal Mines Act, 1911, and of reg. 117. Should this not be so, the mine-owners are still liable because by the terms of reg. 117 they are not only to comply with the regulations but are also under an absolute duty " to enforce " them, and this they have failed to do. Sects. 90 and 102 of the Coal Mines Act, 1911, are advanced as affording defences to the mine-owners. The last words of s. 90 only apply to the vicarious, not to the direct, responsibility of the mine-owners, and further they only apply to the case where the liability is criminal. Sub-ss. 1 and 3 of s. 102, afford defences against the penal consequences of a breach of the statute. Sub-s. 8 provides relief against the civil consequences of such breach. In fact the evidence fell far short of establishing that the mine-owners had discharged the onus upon them of proving that they had taken all reasonable means by, to the best of their power, enforcing the regulations, to prevent contravention or non-compliance (s. 90) or of proving that it was not reasonably practicable to avoid or prevent the breach (s. 102, sub-s. 8). Further, the trial judge has found as a fact that the mine-owners have not brought themselves within the terms of the sub-sections. If the breach by Jones was a breach by the mine-owners themselves, it is clear that the mine-owners cannot show that it was not reasonably practicable to avoid or prevent the breach: see the observations of Lord Atkin in *Lochgelly Iron and Coal Co.* v. *M'Mullan.* (1)

Further, the trial judge has found that the mine-owners committed a breach of their duties as to ventilation under

(1) [1934] A. C. 1, 9.

s. 29. It is not necessary for the plaintiffs to prove a breach of the criminal law in order to found a civil claim. An employer who has committed a breach of a statutory duty cannot rely on the doctrine of common employment: *Groves* v. *Lord Wimborne.* (1)

[They also referred to *Hannaford* v. *May* (2); *Bain* v. *Fyfe Coal Co., Ld.* (3); and *Wilsons* v. *Clyde Coal Co., Ld.* (4)]

Comyns Carr K.C. in reply.

Cur. adv. vult.

1940. Dec. 10. MACKINNON L.J. The facts in this case were very clearly and carefully set forth in his judgment by Lewis J., with an elaborate analysis of the evidence. Some suggestion was made for the respondents that his conclusion on one point was not in accordance with the weight of the evidence, but it was not a strenuous contention. I am content to adopt in their entirety the findings of fact of the learned judge.

This means that the disaster which caused the death of these men was due to one cause and one cause only. The assistant electrician Jones, instead of cutting off the current from the faulty cable, and using the "megger" to test, left the current on and used a piece of flex with one or two bulbs upon it. The result was a spark which ignited explosive gas and caused the disaster. The gas apparently was on the floor, but how it got there is mysterious. The judge accepts the theory that it came from a crack in the floor, and came in a sudden gush at the moment when, unhappily, the action of Jones caused the spark. That may well be the most reasonable explanation of the mystery; but I do not think it is (or was for the learned judge) essential to come to a conclusion as to the source of the gas. It might have been essential on the issue whether the system of ventilation in the mine was adequate, and was being properly worked. I understand the judge to find that for all normal requirements the ventilation

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(1) [1898] 2 Q. B. 402.
(2) [1935] 2 K. B. 385.
(3) 1935 S. C. 681.
(4) [1938] A. C. 57.

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system was adequate, and was being properly worked. The disaster happened because there was a sudden and abnormal emission of gas at the moment when Jones negligently and in defiance of the orders of his superiors used the flex and bulbs and created the spark.

When the learned judge leaves the facts and comes to consider the law, I do not find that his reasoning is quite so clear. I am not surprised at this, for the legal problem involves obscure questions, and in particular the interpretation of the exceedingly difficult and complicated Coal Mines Act, 1911. That task of interpretation is not made easier by the existence of a number of authorities decided upon the Coal Mines Act, 1887, a statute which is almost as complicated as the Coal Mines Act, 1911, but is couched in different terms. Some of those authorities are reported decisions of the House of Lords. I regret that one of them at least is embarrassing rather than helpful. In *Britannic Merthyr Coal Co.* v. *David* (1), the Court of Appeal, with elaborate judgments, ordered a new trial. The House of Lords affirmed their order, but Lord Halsbury and Lord Gorell both say that they cannot agree with some of the reasoning of the judges in the Court of Appeal. It would have been more helpful to their equally fallible successors if their Lordships had explained the particular errors into which this Court then fell.

I start, as I think Lewis J. did, with the proposition derived from *Groves* v. *Lord Wimborne* (2), that when a statute imposes a duty on the owner of a factory, for example, to fence machinery, and imposes penalties for its breach, then if the failure to fulfil the duty causes hurt to a workman (*a*) the workman has a civil claim for damages, and (*b*) to such a claim the master cannot rely on the doctrine of common employment. Lewis J. seems to have been of opinion that there was a breach of the statutory duty as to ventilation imposed by s. 29 of the Act of 1911. He has found that the system of ventilation was adequate for all normal requirements, and was properly worked; but that in fact it was not adequate

(1) [1909] 2 K. B. 146; (H. L.) [1910] A. C. 74.
(2) [1898] 2 Q. B. 402.

to disperse this abnormal, sudden and incalculable emission of gas. Therefore in fact on this occasion it turned out to be inadequate. I do not think that I agree with this reasoning; but I also think it unnecessary to discuss this particular aspect of the case, for, as it seems to me, there was a breach of another statutory duty, and the result of that other breach is sufficient to make the mine-owners liable, and to justify the judgment against them below.

The appellants, the owners of the mine, are a limited company. The company can only act by its servants and agents, and can only carry out the duties imposed on the owners of a coal mine by this Act of 1911 through its servants or agents. By s. 60, sub-s. 4, the use of electricity in a mine is to be subject to the General Regulations, and the duties imposed by those General Regulations have therefore the gravity of statutory duties. The appellant company could only perform those duties by its electrical staff, that is, by Marsh, the chief electrician, and Jones, the assistant electrician. In what Jones is found to have done I think he was clearly breaking No. 131 (*e*) and No. 132 (iii.) of the regulations. There was, therefore, a breach by Jones of statutory duties imposed upon the appellants and their servants; and it was this breach that caused the disaster from which the victims of it suffered.

Prima facie, under the principle of *Groves* v. *Lord Wimborne* (1), I think that this gives the respondents a cause of action against the company. It remains to consider whether the appellant company have any defence to this prima facie claim. Under the terms of this Act of 1911, I think the only defence can be under s. 102, sub-s. 8, which provides that "the owner of a mine shall not be liable to an action for "damages as for breach of a statutory duty . . . . if it is "shown that it was not reasonably practicable to avoid or "prevent the breach." If, as I think, the breach of the statutory duty was committed by Jones, clearly it cannot be said that "it was not reasonably practicable" for Jones "to avoid or prevent the breach." He acted as he did deliberately, and must have known that he was breaking the regulations.

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(1) [1898] 2 Q. B. 402.

The truth is that the possible liability of the owners of a coal mine under this Act is imposed in very stringent terms. I imagine that they might escape under s. 102, sub-s. 8, for the consequences of a breach of reg. 131 (*e*) if they could show that Marsh or Jones had duly made the current dead, but it was switched on by some irresponsible person who had no concern with electrical affairs, and was wickedly interfering—or if some unexpected fall of stone had knocked a switch and turned on the current. But when the breach of the statute has been committed by their servant specially delegated to carry out the regulations, it seems to me quite impossible for the owners to contend that " it was not reasonably practicable " to avoid or prevent " that breach. The language of sub-s. 8, it may be observed, is very different from the provision in s. 102, sub-s. 3, where, in regard to penalties under s. 90, it is provided that an owner may escape from a penalty " if he " proves that the contravention was due to causes over which " he had no control, and against the happening of which it " was impracticable for him to make provision."

I may add that this conclusion seems to be in accordance with the opinion of Lord Wright in *Lochgelly Iron & Coal Co.* v. *M'Mullan.* (1)

In the result I think that Lewis J. came to a correct conclusion, and that these appeals must be dismissed with costs. There is a cross appeal as to the amount of the damages awarded. As that had nothing in common with the appeal we arranged to postpone the hearing of it until we had disposed of the difficult questions raised by the appeal.

LUXMOORE L.J. I have had the privilege of reading and considering the judgment which has just been delivered by my brother MacKinnon, and also that which is about to be delivered by my brother du Parcq. I find myself in complete agreement with the conclusion at which they have arrived, and with the several reasons stated by them for that conclusion.

(1) [1934] A. C. 1, 22, 23.

I do not think it would serve any useful purpose to attempt to restate the same reasons in less happy language, and I have, therefore, refrained from writing a separate judgment. I agree with the order proposed by my brother MacKinnon.

DU PARCQ L.J. Lewis J. has found the facts of this case with great care and precision, and I am satisfied that it would be wrong to disturb his findings. I cannot agree, however, with what I understand to be the learned judge's opinion that, on the facts as he found them, the mine-owners were shown to have been guilty of a breach of the duty imposed upon them by s. 29 of the Coal Mines Act, 1911. In my view the requirements of that section were satisfied. The amount of ventilation produced was adequate to dilute inflammable gases to the extent required by the section, and the intake airways were " normally kept free from inflammable " gas." The cause of the explosion which killed and injured men working in the mine was not any inadequacy of ventilation, but an act of negligence which caused the sudden ignition of inflammable gas. There is nothing to suggest, nor does the judge find, that any amount of ventilation in the ordinary sense of that word would have prevented the disaster, and I am therefore of opinion that the judge's reason for deciding in the present respondents' favour was not satisfactory.

The question remains whether the decision can be supported on other grounds. It is beyond controversy that the cause of the disaster was a negligent act on the part of one of the mine-owners' servants. It was an act for which, but for the doctrine of common employment, the mine-owners would clearly be liable. That doctrine affords them a defence to the claims in so far as they are based solely on the common law. It is plain, however, and indeed it is not in dispute, that the act of negligence was itself a breach of statutory duty. Sect. 60, sub-s. 4, of the Act provides that " the use of "electricity in any mine shall be subject to general regulations "under this Act." Such regulations have been duly made under s. 86 of the Act, and have effect as if enacted in the Act. It is now admitted that the assistant electrician whose

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negligence caused the accident did a thing which constituted a breach of reg. 131 (*e*). But the mere fact that the negligence of a fellow-servant was a breach of a statutory obligation imposed upon him is not sufficient to deprive the master of the benefit of the doctrine of common employment. The first question upon which the decision of this appeal depends is whether there was, in the circumstances of the case, and on the true construction of the statute, a breach of statutory duty by the appellants, the mine-owners. If there was, the only possible defences open to them are those said to be provided by ss. 90 and 102 of the Act.

Reg. 117, which must be read as if it were part of the Act, is in the following words: "It shall be the duty of the mine-owner, "agent and manager to comply with and enforce the following "regulations, and it shall be the duty of all workmen and "persons employed to conduct their work in accordance "with the regulations." I do not accept the contention of the respondents that there is necessarily a breach by the mine-owner of his duty to "enforce" a regulation on every occasion on which a workman or other person employed is guilty of breaking it. Magistrates enforce the law when they punish the offender. The policeman enforces the law when he apprehends the delinquent. It would be an abuse of language to say that every contravention of the regulations on the part of a workman was a proof of the mine-owner's breach of his duty to enforce it. I do not think therefore that in this case the respondents can properly rely on that part of reg. 117 which imposes on the mine-owner a duty to "enforce" the regulations. The mine-owner's duty, however, is not merely "to enforce" but "to comply with "and enforce." If it is right to say that the appellants failed to comply with reg. 132 (*e*), and not merely that one of their workmen failed to comply with it, then the appellants were guilty, subject to any defence they may have under ss. 90 and 102, of a breach of statutory duty.

While it is true that an employer is not necessarily guilty of a breach of statutory duty because a servant employed by him commits such a breach in the course of his employment, it is certainly no less true that there are cases in which the servant's breach of duty may properly be attributed to the master. A statute may be so framed as to make the master vicariously responsible, either civilly or criminally, or both civilly and criminally. Moreover the servant may be the agent to whom the performance of the duty is delegated, and in that case the principle expressed in the maxim "qui facit "per alium facit per se" is operative. If the employer entrusts the performance of a duty to another, he will be liable for its non-performance or breach by that other unless there is something in the statute to exonerate him.

It is plain that the Act imposes a duty on the mine-owner himself to comply with some at least of the regulations as to electricity: otherwise reg. 117 would limit the duty of the mine-owner to the "enforcing" of the regulations. The definition section (s. 122) includes a body corporate in the definition "owner." Even if the mine-owner were a natural person and not, as in this case, a limited liability company, he would hardly be able to comply with any of the regulations, and certainly unable to comply with them all, in the sense of himself carrying them out, or even in the sense of constantly seeing to it that they were carried out. Indeed this task, difficult as it would be for physical reasons, is made impossible in the case of an owner who is not himself qualified to be the manager of the mine by the provisions of s. 2, sub-s. 1, which forbid him to take any part in the technical management of the mine. The Legislature has recognized that in certain cases it would be unfair to subject the mine-owner to a penalty for failing to comply with rules the due observance of which he must perforce leave to agents, but subject to the provisions of s. 102, sub-s. 1, to which it will be necessary for me to refer again, it is expressly enacted by s. 102, sub-s. 2, that "it shall not be any defence in any proceedings brought "against the owner . . . . of a mine . . . . that a manager "of the mine has been appointed in accordance with this "Act."

It is not necessary to decide whether the owner is bound to "comply with" every one of the regulations to which

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reg. 117 refers. It may be that there are some with which, from their very nature, it is impossible that the owner should comply, and that his only duty with regard to these is to "enforce" them. Further, it must, I think, be true to say, that a breach of duty by some person who has not been entrusted by the mine-owner with the performance of the duty on his behalf, is no evidence of a failure by the owner to comply with the Act. I find no difficulty, however, in holding that the mine-owner is under an obligation to "comply with" reg. 131 (*e*), and that in the present case the appellants have failed in that duty. The person immediately responsible for the performance of this obligation is the electrician, or assistant electrician, who has to be appointed by the manager. (See regs. 118 and 131 (*b*).) His duties are set out in reg. 131 (*c*), and in my opinion he must be regarded as the mine-owner's agent to perform those duties—the agent through whom the owner must act, and in this case did act. The mine-owner, through the manager, has entrusted him with the performance of the duty: it follows that the law attributes to the owner his acts and omissions and regards them as the mine-owner's own acts and omissions, for which he is directly responsible. Proof of the facts which were established in this case in my opinion fully supported the pleaded allegation that "the "defendants [appellants] failed to comply with the Electricity "Regulations."

The appellants rely, however, on s. 90 of the Act. It is impossible in my view to construe s. 90 as meaning that the owner is never to be found guilty of non-compliance with a regulation if he can prove that he has taken all reasonable means to prevent such non-compliance. This would be to say, in effect, that the owner was liable only for a failure to "enforce" the regulations, in the sense in which I have said that in my opinion this word should be construed, whereas reg. 117 puts upon him a duty both to comply with them and to enforce them. In my view the owner who has failed to comply with reg. 117, being a person bound to observe the regulations, is guilty of an offence, and the defence which s. 90 allows is not open to him. He can never avail himself of that defence when the breach of duty in question is that of an agent through whom he is acting, or, in other words, his own breach in contemplation of law.

The defences founded on s. 102, sub-ss. 1, 3 and 8, have now to be considered. If s. 102 is read as a whole it seems to me to be clear that the Legislature is drawing a distinction between civil and criminal liability. The Act has already imposed statutory obligations on the mine-owner, and in order to establish liability in a civil action it is enough to show the existence of a statutory duty: if that is shown, it is immaterial that no penalty is imposed for the breach: see the judgment of A. L. Smith L.J. in *Groves* v. *Lord Wimborne.* (1) Apart from authority I should have thought it plain that, whenever a duty has been imposed on an owner, sub-ss. 1 and 2 merely free him from the penal consequences which, but for their provisions, would follow the breach, and that he must look to sub-s. 8 for relief in civil proceedings.

It is contended, however, that we are bound by authority to hold that (as it was put by counsel for the appellants) "any defence which is open in criminal proceedings is also "a defence in a civil action." In support of this proposition three decisions of the House of Lords were cited: *Britannic Merthyr Coal Co., Ld.* v. *David* (2); *Butler* (*or Black*) v. *Fife Coal Co.* (3) and *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (4). In each of these cases the House of Lords was construing not the Act of 1911 but the Coal Mines Regulation Act, 1887. The material sections of the latter Act were ss. 49 and 50. Sect. 50 is in much the same terms as s. 90 of the Act of 1911. It is plain that the duty imposed on the mine-owner by these sections was a qualified duty. Rules were to be observed "so far as reasonably practicable." Moreover, the owner was to be held guilty if any other person whomsoever contravened the rules, subject to the proviso that he was not then to be found guilty if he could prove that he had taken all reasonable means to prevent the contravention. Counsel

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(1) [1898] 2 Q. B. 402, 407.

(2) [1910] A. C. 74.

(3) [1912] A. C. 149.

(4) [1912] A. C. 693.

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for the appellants placed great reliance on the words of Lord Atkinson in *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (1), where, construing s. 50 as it applied to an owner who was made liable for the acts of others, he said that the words at the end of the section provided a defence to criminal liability, adding, " And if it be a defence against criminal liability it is clearly, " I think, a matter of defence against civil responsibility " also." It is plain, however, that Lord Atkinson was not laying down any general rule, any more than was Lord Halsbury in *David's* case. (2) He was pointing out, what can hardly be doubted, that the sections then in question imposed, in certain circumstances, a qualified and not an absolute duty, and that this was true of civil as well as of criminal liability. Lord Kinnear's speech in *Butler's* case (3), so far as this particular point is concerned, was to the same effect. I find nothing in the decisions of the House of Lords to compel me to reject the construction which, apart from authority, would appear to be plainly correct, and I have accordingly come to the conclusion that sub-ss. 1 and 3 of s. 102 afford no defence in this case. I may add that I am not satisfied that, on the true construction of sub-s. 1, it can be said that the appellant company has proved that it " was not in the habit of taking, " and did not in respect of the matters in question take, any " part in the management of the mine." I prefer to express no opinion on this point, which seems to me to involve questions of some difficulty, especially in a case where the defendants are a body corporate.

The only remaining question is whether the appellants have shown, in the words of s. 102, sub-s. 8, " that it was not " reasonably practicable to avoid or prevent the breach." On the view which I take and have endeavoured to express it is, I think, plain that they have not. If the assistant electrician's act was the appellant company's act, and his breach of duty the company's breach of duty, clearly the company cannot say that it was not reasonably practicable to avoid or prevent it. The appellants seek to construe the

(1) [1912] A. C. 693, 705.
(2) [1910] A. C. 74.
(3) [1912] A. C. 149.

section in such a sense that they would be relieved of civil liability by showing that their electrician acted without their knowledge and contrary to their instructions. In my opinion this is an impossible construction. In order to escape liability it would be necessary for the mine-owner to show that it was not reasonably practicable either for him or for his agent, the assistant electrician, to avoid or prevent the breach, and it is clear that if the assistant electrician had not himself disregarded the regulations the disaster would not have happened. I am of opinion, therefore, that s. 102, sub-s. 8, has no application to this case.

On these grounds I have come to the conclusion that the appellants, having been guilty of a breach of statutory duty, cannot rely on the defence of common employment, and that none of the other suggested defences will avail them. I am happy to think that the construction which this Court has put upon the material sections of the Act appears to be in accordance with the general policy of the Act. The construction for which the appellants contended would, as it seems to me, produce a result which it would be hard to believe that Parliament intended. The theory behind the doctrine of common employment is that a workman impliedly contracts to take the risk of a fellow servant's negligence. It would be difficult indeed to imply in the contract of service a term that the workman must take the risk of any neglect on the part of an agent appointed to act in the master's place for the purpose of carrying out statutory provisions made for the workman's safety. Moreover, it would be unfortunate, to say the least of it, if a workman's right to recover in such a case as this were to depend on the ability of the company to prove that it did not concern itself with the management of the mine and left everything to the manager, and if proof of these facts were to deprive him of that right. It is, however, an intelligible provision that in civil proceedings it should be open to the mine-owner to prove, by way of defence, that the breach of statutory duty was one which it was not reasonably practicable to avoid or prevent. Some unforeseen accident may put it out of the power of those in responsible positions to

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comply with the Act, or their precautions may be rendered futile by the careless or wrongful act of a workman or a stranger. The Legislature has been at pains to distinguish between civil and criminal liability, and it is not for the Courts to seek, in decisions dealing with a repealed Act, drafted on a different plan and in different language, grounds for ignoring the distinction which Parliament has made.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for appellants (defendants): *William A. Crump & Son, for A. J. Prosser, Cardiff.*

Solicitors for respondents (plaintiffs): *Russell Jones & Co., for Morgan, Bruce & Nicholas, Pontypridd.*

A. W. G.

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By the proviso to s. 41 of the Army Act, 1881, it is provided that " A person subject to military law shall not be tried by " court martial for treason, murder, manslaughter, treason-felony, " or rape committed in the United Kingdom . . . . "

Sect. 188 : " Where a person subject to military law is on board " a ship, this Act shall apply until he arrives at the port of " disembarkation in like manner as if he and the officers in " command of him were on land at the place at which he " embarked on board the said ship . . . . "

Sect. 190, sub-s. 20A : " The expression ' United Kingdom ' " includes . . . . the Channel Islands and the Isle of Man."

By the Royal and Parliamentary Titles Act, 1927, s. 2, sub-s. 2 : " In every Act passed and public document issued after the " passing of this Act the expression ' United Kingdom ' shall, " unless the context otherwise requires, mean Great Britain and " Northern Ireland."

An officer in His Majesty's Forces was charged before a court martial with having committed a murder in a British ship upon the high seas. He applied for an order for prohibition on the ground that the court martial had no jurisdiction to try him by reason of the proviso to s. 41 of the Army Act, 1881, inasmuch as a British ship upon the high seas was part of the United Kingdom, and, secondly, that by reason of s. 188 of the Army Act, the crime must be deemed to have been committed at the port of embarkation in the United Kingdom :—

Held, that the alleged crime was not committed in the United Kingdom as a British ship on the high seas was not part of the United Kingdom within the proviso to s. 41 of the Army Act, and that s. 188 of that Act did not provide that a crime committed on board a British ship on the high seas must be deemed to have been committed at the place in the United Kingdom from which the ship sailed, but was a mere machinery section dealing with the procedure to be adopted with regard to the convening of a court martial for the trial of a person subject to military law who was alleged to have committed a crime in a British ship on the high seas, and who was brought back to the United Kingdom for trial.

APPLICATION by way of motion for an order for prohibition.

The applicant, who was an officer in His Majesty's Forces, was brought before a general court martial upon a charge of having when on active service committed a civil offence, namely, murder in a British ship on the high seas. When the applicant appeared before the court martial and was asked to plead to the charge he, by the officer who was defending him, objected to the jurisdiction of the Court on the ground that only a civil court could try him for the offence alleged in the charge sheet. The court martial adjourned the trial. The applicant, having obtained the necessary leave applied to the Divisional Court for an order for prohibition directed to the general officer commanding the Western Command, and the person nominated as the president of the court martial, the order asked for being to prohibit the court martial from trying the case on the ground that it had no jurisdiction to do so.

W. K. Carter for the applicant. The court martial has no jurisdiction to try the applicant for the offence of murder because the proviso to s. 41 of the Army Act provides that "A person subject to military law shall not be tried by court "martial for treason, murder, manslaughter, treason-felony, "or rape committed in the United Kingdom." The proviso as to active service does not apply unless the offence was committed in one of the Dominions. The ship on which the offence was alleged to have been committed had not arrived at its destination, but was on the high seas and therefore was part of the United Kingdom. In *Reg.* v. *Anderson* (1) a man was killed on a British ship which, at the time the offence was committed, was in the river Garonne, at a place where the tide flows and below all bridges, within the boundaries of the French empire, on her way up to Bordeaux, and it was held that the man who committed the offence could be properly tried at the Central Criminal Court, as the ship was at the time within the Admiralty jurisdiction. Blackburn J. there said (2) in the course of the argument, "It has been decided "that a ship, which bears a nation's flag, is to be treated as

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(1) (1868) L. R. 1 C. C. R. 161.

(2) Ibid. 163.

" part of the territory of that nation. A ship is a kind of " floating island." In the course of his judgment he said (1): " There are a vast number of cases which decide that when a " ship is sailing on the high seas, and bearing the flag of a " particular nation, the ship forms a part of that nation's " country, and all persons on board of her may be considered " as within the jurisdiction of that nation whose flag is flying " on the ship, in the same manner as if they were within the " territory of that nation." It is clear from that case that a person who is on board a British ship must be treated as if he were in the United Kingdom. In *Forbes* v. *Cochrane* (2) it was held that where a slave had escaped from a foreign country where slavery was permitted and got on board a British ship of war on the high seas, a British subject resident in that country, who claimed the slave as his property, could not maintain an action against the commander of the ship for harbouring the slave. Holroyd J. there said (3): " In this case, indeed, the " fugitives did not escape to any island belonging to England, " but they went on board an English ship (which for this " purpose may be considered a floating island) and in that " ship they became subject to the English laws alone." Best J. said (4): " These men, when on board an English ship, " had all the rights belonging to Englishmen, and were subject " to all their liabilities. If they had committed any offence " they must have been tried according to English laws." In that case it was held that a British ship was in the same position as a floating island, and that a slave who had escaped to a British ship was in the same position as if he had escaped to the United Kingdom.

Secondly, the court martial has no jurisdiction to try the applicant because s. 188 of the Army Act provides that " where a person subject to military law is on board a ship, " this Act shall apply until he arrives at the port of disembarkation in like manner as if he and the officers in " command of him were on land at the place at which he " embarked on board the same ship . . . ." While a man is on board a ship and before it arrives at the port of disembarkation he is to be regarded as still being at the port of embarkation, and if an offence is committed on board the ship the Act applies as if the offence were committed at the port of embarkation in the United Kingdom.

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(1) L. R. 1 C. C. R. 169.
(2) (1824) 2 B. & C. 448.
(3) 2 B. & C. 464.
(4) Ibid. 467.

Thirdly, it is stated in the Manual of Military Law, 7th ed., ch. 7, p. 103, that military courts " are not allowed to try " the most serious offences—treason, murder, manslaughter, " treason-felony or rape—if those offences can, with reasonable " convenience, be tried by a civil court. They are, therefore, " prohibited from trying any such offence if it is committed " in the United Kingdom, or if it is committed anywhere else " in the King's dominions, except Gibraltar, within a hundred " miles from a place where the offender can be tried by a " civil court, unless indeed the offence is committed on active " service." Civil courts have maintained their predominance over military courts and military courts are bound to hand over to the civil courts any person whom the civil courts require to be handed over.

Sir William Jowitt S.-G. and *Valentine Holmes* for the Crown. This case raises a serious point because if the argument put forward on behalf of the applicant is correct the result will be that if a murder is committed on a British troop ship on the high seas the man alleged to have committed the offence could not be tried by a court martial, but both he and the witnesses would have to be brought back to the United Kingdom so that the trial might take place here in a civil court. The meaning of s. 188 of the Army Act is not that suggested by counsel for the applicant. Under s. 122 the Royal warrant is required for the convening and confirming general courts-martial and s. 123 enables any officer or person authorized to convene general courts-martial to convene a district court martial for the trial under the Act of any person under his command who is subject to military law. When a troop ship is leaving the United Kingdom the officer in command of the troops is given authority to convene a court martial. When the ship has left the port of embarkation the general authority would lapse and then s. 188 comes into

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operation. It is sought by the applicant to read that section as if it enacted that the Act should apply as if the crime were committed at the port of embarkation, but such a construction leaves out of account the limitation of time and the fact that the Act is to apply both to the offender and to the officers in command of him as if they were on land at the place where the embarkation took place. That section was passed in order to enable a court martial to be convened for the trial of the offender. The question in this case turns upon whether upon the true construction of s. 41 of the Army Act, the words in that section " United Kingdom " include a British ship upon the high seas. It was provided by s. 2, sub-s. 2, of the Royal and Parliamentary Titles Act, 1927, that " in " every Act passed and public document issued after the " passing of this Act " [April 12, 1927] " the expression " ' United Kingdom ' shall, unless the context otherwise " requires, mean Great Britain and Northern Ireland." The Army and Air Force (Annual) Act, 1932, defined the expression " United Kingdom " as including "the Channel Islands and " the Isle of Man." The draftsman was there adding the Channel Islands and the Isle of Man to the definition in the Act of 1927. The definition of " foreign country " in para. 24 of s. 190 of the Army Act, is given as meaning " any place " which is not situate in the United Kingdom, a dominion, " colony, India or Burma, as above defined, and is not on the " high seas." The Legislature therefore had its attention directed to the high seas. If the contention for the applicant be correct and a British ship on the high seas was a part of the United Kingdom it would not be necessary to add the words "and is not on the high seas" in its definition of " foreign country." The arguments as to the grounds upon which the jurisdiction of a state over ships belonging to it ought to be placed are set out in Hall's International Law, 8th ed., ch. 6, p. 301 et seq. The whole passage is strongly opposed to the floating island theory. The author there points out that the origin of the doctrine of the territoriality of vessels cannot be traced further back than 1752, when the Prussian Government put forward the doctrine in the

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Exposition des Motifs in justification of its behaviour in confiscating the funds payable to its English creditors in respect of the Silesian loan. Lord Stowell's opinion, set out in a note on p. 304, was that "the great and fundamental "principle of British maritime jurisprudence is, that ships "upon the high seas compose no part of the territory of a "state. The surrender of this principle would be a virtual "surrender of the belligerent rights of this country." If a neutral ship was really a part of the territory of the state to which it belonged it could not be seized and condemned as prize for carrying contraband of war. The fact that a neutral ship can be seized and condemned as prize of war for carrying contraband of war shows that it is not part of the territory of the neutral state to which it belongs. In *Forbes* v. *Cochrane* Best J. said (1): "and so far as this question is concerned, "there is no difference between an English ship and the soil "of England," and he went on to say: "for are not those "on board an English ship as much protected and governed "by the English laws as if they stood upon English land?" His judgment depended upon the principle that British law applies to a British ship, and not upon the floating island theory. A British ship is treated as if it were part of Great Britain, but it does not follow that it is a part of Great Britain. Blackburn J. said in *Reg.* v. *Anderson* (2): "when a ship is "sailing on the high seas, and bearing the flag of a particular "nation, the ship forms a part of that nation's country, and "all persons on board of her may be considered as within the "jurisdiction of that nation whose flag is flying on the ship, "in the same manner as if they were within the territory of "that nation." That is a corollary to the principle that British law applies to British ships, but that learned judge did not say that a British ship is a part of Great Britain. The question is as to the meaning of the words "United "Kingdom" in s. 41 of the Army Act. The proper construction of those words is that they mean what they were defined to mean in the Act of 1927, namely "Great Britain and Northern "Ireland." It would be very unfortunate if, when a crime was committed on a British ship, the person committing the crime were obliged to be sent back to this country in order to be tried at the Central Criminal Court. If the crime of murder were committed by a soldier on a British ship proceeding, say, to Egypt the offender would be tried by court martial when the ship arrived at Egypt. This would be done under a convention with the foreign country.

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(1) 2 B. & C. 468.

(2) L. R. 1 C. C. R. 169.

W. K. Carter in reply. It must be assumed that under s. 188 of the Army Act, the Act applies to everyone who went on board the troop ship at the port of embarkation for all purposes and not merely for the limited purpose of convening a court martial. The words of the section are clear and unambiguous and are not limited in the way suggested. They are not merely part of the machinery for convening a court martial. The Army Act is passed annually and it does not refer to the Act of 1927, which was passed for an entirely different purpose, namely, to define the titles of the King and only applies to Acts passed for that purpose.

Cur. adv. vult.

1941. Jan. 14. HUMPHREYS J. The matter turns upon the proviso to s. 41 of the Army Act, 1881, which is an annual Act kept in force at the present time by an Act of 1940. Sect. 41 is a section which follows a number of sections in the Act which deal with trial by court martial of various persons for various offences; and the Act includes a section which makes it clear that nothing in the Act is to affect the jurisdiction of a civil court to try any person for any offence, although that person is subject to military law. It, therefore, gives concurrent jurisdiction in certain cases to a court martial, and it provides for the trial by court martial of certain matters which are not offences at common law or under the ordinary civil law of the State. Sect. 41 deals with certain specific offences and crimes and provides that if a person, while subject to military law, shall commit any of certain offences, he shall be deemed to be guilty of an offence against military law; and if charged under this section with any such offence shall be liable to be tried by court martial and on conviction to be punished, as stated in the section. The offences are treason, murder, an offence under the Treachery Act, which is an Act passed during the present war in the year 1940, manslaughter and treason-felony. Then we come to the proviso, which is as follows : " Provided that a person subject to military law shall " not be tried by court martial for " (inter alia) " murder " committed in the United Kingdom," and that is followed by a further provision as to what is to happen to a person who is charged with, amongst other offences, murder committed in any place in His Majesty's dominions other than the United Kingdom. We are not, I think, concerned with the latter part of the proviso. The first part of the proviso, however, which I have read, contains those pregnant words : " A person subject to military law shall not be tried by court " martial for murder committed in the United Kingdom," and the short point which is made in this case on behalf of the applicant is that, according to the charge sheet, which was the basis of the jurisdiction of the general court martial, he is charged with having committed murder in the United Kingdom. The argument of Mr. Carter really involves two propositions, the first of which is undisputed, the second of which is disputed. Mr. Carter said, and there can be no doubt of the correctness of his argument, that for very many years it has been contended by the Crown that the jurisdiction of British Courts not only applies in England but applies to persons on a British ship, so long as that ship is on the high seas. That doctrine was accepted by the Courts very many years ago and is now beyond any question. It has been adopted by Parliament and there are various statutes which deal with the method of trial of persons who have committed offences on board a British ship on the high seas. It follows that the law of this country being that a person on board a British ship on the high seas is liable to the jurisdiction of our Courts, that he has the corresponding rights and privileges against other persons which are given to persons who are within the jurisdiction of our Courts. Mr. Carter says that it follows from that doctrine, which is undisputed, that a person who commits a crime on a British ship on the high seas has committed a crime in the United Kingdom. The learned Solicitor-General, who appeared in this case on behalf of the Crown, accepts the first part of that argument. He says, however, as to the second part, that it is a complete non sequitur. In my opinion, the argument of the learned Solicitor-General is right. For my own part, I think that not only is the second part of that argument a non sequitur upon the first, but it is almost a contradiction of it, for the doctrine is only needed because one starts with the assumption that a crime is alleged to have been committed by some person who was not in England; and it is because it is necessary for some Court to have jurisdiction over a crime committed on a British ship that it was held, and has always been the law for a great many years, that there is jurisdiction in those circumstances, although the person has not committed the crime in England, to try him in the same way as if he had committed the crime in England, for the reason that he is alleged to have committed a crime upon a British ship, where all persons are under the ægis of the British flag, which carries with it the rights and privileges of a British subject and the liability to the British law.

Looking at the words of the proviso to the section, the answer to Mr. Carter's argument would seem to be that, construing this proviso according to the ordinary and natural meaning of the words, this officer is not charged with having committed any crime in the United Kingdom. Mr. Carter's argument depends upon his submission that the doctrine above referred to is based upon a legal fiction that the British ship is part of the territory of England, although it is not so in fact, and in support of that contention he has referred this Court to two authorities, at which it becomes necessary to look. The earliest in point of date is *Forbes* v. *Cochrane.* (1) The decision in that case does not help Mr. Carter at all, because it was upon a totally different point. It was a case which decided that where a slave had escaped from a country where slavery was permitted, and had by some means made his way to and was found on a

(1) 2 B. & C. 448.

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British ship on the high seas, his late owner, although a British subject, had no rights over that ex-slave at all, and could not bring an action against the captain of the British ship for refusing to hand over his ex-slave to him. That was what the case decided. Mr. Carter says that in the course of some of the judgments in that case, it was assumed by the Court that the reason for that decision was that the ship was part of British territory, in other words, was to all intents and purposes, England. The first passage which is relied upon is to be found in the judgment of Holroyd J., the second judgment in the case. Holroyd J. stated the law, so far as it was applicable to that case, in these words (1): " when a " party "—that is the slave—" gets out of the territory where " it prevails, and out of the power of his master, and gets " under the protection of another power, without any " wrongful act done by the party giving that protection, the " right of the master, which is founded on the municipal law " of the particular place only, does not continue." That is the decision of the Court, and that learned judge then proceeded to consider what would be the position if the slave in that case had, as slaves in other previous cases had, succeeded in getting to England, and he observed: " This has been " decided to be the law with respect to a person who has " been a slave in any of our West India colonies, and " comes to this country." Then by way of further illustration and with a view of arriving eventually at the law relating to the facts of the case he was trying, the learned judge proceeded to indulge in some rather fanciful theories. He took the case of a conquered country and discussed what would be the position in that case, and observed that it was different from the present case. He then proceeded as follows: " Put the case of an uninhabited island discovered and " colonized by the subjects of this country; the inhabitants " would be protected and governed by the laws of this " country." Then he proceeded (2): " In this case, indeed, "the fugitives did not escape to any island belonging to "England, but they went on board an English ship (which

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(1) 2 B. & C. 463.

(2) Ibid. 464.

"for this purpose may be considered a floating island)." It is that passage which Mr. Carter contended involved the proposition that in contemplation of law the floating island was England. It is only necessary to read that which I have read, to show that that is not the idea at all. The whole idea is that if you get an island which ex concessis is not England and has nothing to do with England except that it has been colonized by British subjects and eventually claimed as part of the British dominions belonging to the Crown, if you get such a case, although the island is not in England or part of England, it is an illustration of the position in which British subjects find themselves where they are subject to the laws of England. The learned judge continues: "and in that "ship they became subject to the English laws alone. They "then stood in the same situation in this respect as if they "had come to an island colonized by the English." So much for that passage which, in my view, does not in the least tend to prove the proposition Mr. Carter set out to establish.

The next passage which Mr. Carter relied on is to be found in the judgment of Best J. (1), who also indulged in some picturesque illustrations and, as he himself said, used some strong language on the subject of slavery. He commenced his judgment by observing: "The feelings which are naturally "excited by a discussion of the subject of slavery may perhaps "betray me into some warmth of expression." Then in the course of his judgment we find this (2): "The moment they "put their feet on board of a British man-of-war, not lying "within the waters of East Florida (where, undoubtedly, the "laws of that country would prevail)"—East Florida in those days, be it observed, belonged to Spain—"those persons who "before had been slaves, were free." Then he says: "These "men, when on board an English ship, had all the rights "belonging to Englishmen, and were subject to all their "liabilities. If they had committed any offence they must "have been tried according to English laws. If any injury "had been done to them they would have had a remedy by "applying to the laws of this country for redress," and so forth. Then the learned judge goes on to consider a case which had been decided some time before, known as *Sommersett's* case (1), and observed that in that case it was held that if such a slave acting upon his newly recovered right of freedom, had determined to vindicate that right and had resisted the force, that is the force which would be used to take him back into slavery, and his death had resulted in the course of such resistance, "can there be any doubt that everyone who had "contributed to that death would, according to our laws, "be guilty of murder?" I pause here to say that it may well be that in these days we should substitute the word "manslaughter" for the word "murder" on such facts. He goes on (2): "That is substantially decided by *Sommersett's* "case (1), from which it is clear that such would have been "the consequence had these slaves been in England; and so "far as this question is concerned, there is no difference "between an English ship and the soil of England; for are "not those on board an English ship as much protected and "governed by the English laws as if they stood upon English "land." For my own part, I cannot read that judgment as indicating that in the opinion of Best J. the basis of the doctrine which he was enunciating was that the ship was in England, or was part of England. I do not think that that decision assists the applicant's argument.

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(1) 2 B. &. C. 464.

(2) Ibid. 467.

The only other case which was referred to is the very well known case of *Reg.* v. *Anderson.* (3) In that case, I think, all the judges accepted, merely as an illustration, the notion of a ship being somewhat analogous to an island, and no doubt that is a convenient way of looking at the matter. It is when one comes to the judgments, however, that one finds, in my opinion, that no assistance is there given to the argument which has been addressed to this Court. The leading judgment in that case was given by Bovill C.J., but no part of that has been relied upon by Mr. Carter. The next judgment was given by Channell B., who observed this (4): "The ground "of decision in my opinion is that the ship in question was

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(1) (1771-2) 20 State Trials 1.
(2) 2 B. & C. 468.
(3) L. R. 1 C. C. R. 161.
(4) Ibid. 167.

"within the Admiralty jurisdiction at the time the offence "was committed, and that that of itself is sufficient to support "the conviction." That was a case which had occurred on board a British ship when she was not upon the high seas, as that expression is usually understood, but was in fact in the river Garonne, at a place where it is very wide, where the tide ebbs and flows and great ships go. The Court did not decide for the first time, but approved of two previous decisions which had arisen in Chinese waters, where it had been held, in those circumstances, that the jurisdiction of the British Lord High Admiral applied to a British ship, just as much as it would apply if she were on the high seas. The other point in the case was the question of the nationality of the person who committed the offence. That does not arise here, because the applicant is a British subject. That being the ground of the decision, be it observed that in several of the judgments the judges were careful to observe that that was the ground, and the only ground, of their decision, that the jurisdiction of the Admiralty applies in such a case to such a person; but Mr. Carter relied upon certain observations of Blackburn J. and the first of those passages is in the course of the argument, where Mr. Montague Williams said this, referring to s. 267 of the Merchant Shipping Act, 1854: "The section in question must be limited to British subjects. "The legislature cannot legislate for the subjects of a foreign "power. The 18 & 19 Vict. c. 91, s. 21, professes to legislate "for offences committed on board ship on the high seas by "those not British subjects. If the legislature could make "such an enactment, still the place in question is not the "high seas. It was within the Empire of France." No doubt it was. No doubt there was concurrent jurisdiction in that case. If the French Courts had chosen, they could have tried this person, but they declined jurisdiction, and Blackburn J. then observed (1): "It has been decided that a ship, which "bears a nation's flag, is to be treated as part of the territory "of that nation. A ship is a kind of floating island." That is the strongest expression Mr. Carter has been able to find

(1) L. R. 1 C. C. R. 163.

in any reported case for the proposition which he has put forward. When one comes to the judgment of Blackburn J. one finds that the learned judge deals with the matter much more particularly and, perhaps, if I may say so without impropriety, more accurately. He says (1): "There are a "vast number of cases which decide that when a ship is sailing "on the high seas, and bearing the flag of a particular nation, "the ship forms a part of that nation's country, and all persons "on board of her may be considered as within the jurisdiction "of that nation whose flag is flying on the ship, in the same "manner as if they were within the territory of that nation." If I am right in my understanding of the English language, the meaning of that passage is that persons on board a British ship are within the jurisdiction of the British Courts, although they are not within the territory of Great Britain. That is the only passage in that case, I think, which is relied upon by Mr. Carter.

We have been referred to the definition which is to be found in the Army Act (1932 edition) of the expression the "United "Kingdom." In my opinion, it does not help at all. Sect. 190, sub-s. 20A, of the Act provides: "The expression 'United "'Kingdom' includes . . . . the Channel Islands and the Isle of "Man," and that is the only definition one finds. It has not been thought necessary, as far as I know, in the latest edition of the Army Act—that is the Act of 1940—to define the expression "United Kingdom." It may be because that expression had already been defined in 1927 by a General Act, namely, The Royal and Parliamentary Titles Act, 1927, which is "an Act to provide for the alteration of the Royal "Style and Titles and of the Style of Parliament and for "purposes incidental thereto." In sub-s. 2 of s. 2, that Act provides as follows: "In every Act passed and public docu-"ment issued after the passing of this Act the expression "'United Kingdom' shall, unless the context otherwise "requires, mean Great Britain and Northern Ireland." That is relied on by the Crown, not for what it contains but for what it does not contain, that is, any indication that a British

(1) L. R. 1 C. C. R. 169.

ship is regarded, or can be regarded in law, as part of the United Kingdom. The definition which I have referred to in sub-s. 20A of s. 190 of the Army Act is explained by the fact that in 1932 another Act of Parliament, to which it is not otherwise necessary to refer, had included in the definition of "United Kingdom" the Channel Islands and the Isle of Man, and therefore one finds that it is included for the purposes of the Army Act in sub-s. 20A. For my own part, I am not disposed to rely in my judgment very much upon the definitions in either of those sections.

One other matter must be dealt with. Mr. Carter drew our attention to s. 188 of the Army Act. Sect. 188 is, at first sight, a little difficult to understand, and I think that the Court is indebted to the learned Solicitor-General for an explanation which, so far as I am concerned, satisfies me as to the meaning to be attached to what is perhaps more difficult to follow without the explanation, the reason for the insertion of that section at all in the Act. It provides: "Where a person "subject to military law is on board a ship, this Act shall "apply until he arrives at the port of disembarkation in like "manner as if he and the officers in command of him were "on land at the place at which he embarked on board the "said ship," subject to the proviso which deals with a person who is tried by court martial on the ship.

Mr. Carter's argument was that that section, found in the place where it is, is a section which explains s. 41, and which renders the expression "the United Kingdom" in s. 41, as meaning that not only is a person who is on board a British ship to be treated and to be assumed to be in the United Kingdom, but he is assumed to be in that place in the United Kingdom from which the ship sailed. It would be very remarkable indeed if it were the fact that Parliament had waited until s. 188 to deal with such a matter, but the learned Solicitor-General has drawn our attention, amongst others, to s. 122 of the Act, which deals with the convening of courts-martial, and so far as I am concerned has satisfied me that s. 188 is nothing more than a machinery section, a section dealing with the procedure which otherwise would be very difficult in the case of a person who is alleged to have committed a crime on a British ship, is brought back for trial to this country, and has to be tried somewhere. Where is he to be tried? If he is to be tried by court martial, who is to be the person who has power over him, because various persons in this country are given power to convene courts martial. The King, of course, is the person who must give the original authority. The practice is, as appears from s. 122, for His Majesty to authorize certain persons, who are the officers in command of various districts in England, to do so. We have no evidence about it, and for myself I am quite ignorant on these subjects, but I gather that there are at least four districts. There is certainly the Western Command, as we know by the papers in this case. Then I believe there is a Northern Command, an Eastern and a Southern Command; for all I know there may be others. But assume the case put, which is this case; who is to convene the court martial? How is this person to be tried by court martial? Looking at s. 122, one finds that the powers of those persons who are given the right to convene a general court martial are strictly limited to the case of persons subject to military law who may be for the time being under or within the territorial limits of that command. So one has to find out what is the position. Here is a ship on the high seas. It does not matter when she comes back to England or at which port she arrives; that cannot give jurisdiction to anyone. But which of the general officers in command of the different districts is to have the right to convene a court martial? The answer is to be found, I think, in s. 188 as follows, the Act in relation to convening a court martial is to apply to a person subject to military law, and being on board a ship, in the same manner as if the person were on land at the place at which he embarked on the ship. The result of that is that in the present case the officer in question, the applicant, having embarked at a certain port from which the ship sailed, which port is within the territorial command of a particular general officer, that general officer is the right person to convene the court martial, and that is what has been done in this case. There may be other uses of s. 188; I confess my ignorance of these matters;

it may well be so. I think, however, that it cannot be successfully contended that s. 188 is intended in any way to mean that a person on board a British ship, who is alleged to have committed a crime while that ship was on the high seas, is to be deemed to have committed that crime at the port of embarkation, when in point of fact everybody knows that he did not.

For these reasons my opinion is that the words in the proviso to s. 41 must receive their plain and natural meaning, and in my judgment the crime charged is not alleged to have been committed in the United Kingdom, but upon the high seas, which are not within the United Kingdom. Therefore, in my opinion the general court martial has jurisdiction, and this order of prohibition ought not to issue.

TUCKER J. I entirely agree with everything that has been said by my Lord, and I would add no observations of my own were it not for the importance of the subject with which we are dealing.

I would emphasize that we are here being asked to construe the words " the United Kingdom " in a particular Act of Parliament, and in a particular section of that Act of Parliament, and that is all that we are called upon to do. This case, in my view, has no bearing upon what is the origin of the jurisdiction that is claimed by the English Courts over British subjects on British ships on the high seas. This Act of Parliament is a domestic Act, and it is dealing with the conflict, or the possibility of conflict, between claims of two domestic tribunals, that is to say the civil courts of this country and the military courts, the courts-martial, of this country, and I think it is important to bear that in mind when construing the words " United Kingdom " in the proviso to s. 41.

Starting from that point, it is to be observed that we are in this case dealing with an Act that has been re-enacted in the year 1940, and also that in an Act passed in 1927 and described as " An Act to provide for the alteration of the "Royal Style and Titles and of the Style of Parliament and "for purposes incidental thereto," being c. 4 of 17 Geo. 5, it is provided in s. 2, sub-s. 2: " In every Act passed and public "document issued after the passing of this Act the expression "' United Kingdom ' shall, unless the context otherwise "requires, mean Great Britain and Northern Ireland." In my view, it is necessary to see whether, in this particular Act, namely, the Army Act, the context requires the inclusion in the definition of " United Kingdom " of British ships on the high seas in addition to Great Britain and Northern Ireland, and from a perusal of the Act as a whole, I do not think that it does. It is to be observed that this Act is incidentally dealing with the position of the Armed Forces of the Crown in numerous different places, in the United Kingdom, in British India, in Burma, in the Dominions properly so-called such as Canada, in Colonies, and also in foreign countries. I think that s. 41 visualizes the possibility of these particular crimes, including that of murder, being committed in the United Kingdom, in any place within His Majesty's dominions other than the United Kingdom and Gibraltar, in a foreign country and on the high seas, and in my view the proviso to s. 41 does not touch the case of the crime of murder which is alleged to have been committed either on a British ship on the high seas or in a foreign country. It is a proviso dealing only with those offences if committed in the United Kingdom or in any place within His Majesty's dominions other than the United Kingdom and Gibraltar. We are not concerned in this case with the remainder of His Majesty's dominions, only with the United Kingdom.

In the definition section of the Army Act, s. 190, it is to be observed that the expression " foreign country " is defined in sub-s. 24 as follows: " The expression ' foreign country ' "means any place which is not situate in the United Kingdom, "a Dominion, a Colony, India or Burma and is not on the "high seas." If the high seas were included in the United Kingdom, there was no necessity to add those words " and is "not on the high seas." It is quite true that the words " not "on the high seas " do not include any reference to a British ship on the high seas, but none the less I think it tends to show that the framers of this Act of Parliament appreciated that a ship on the high seas was not, as it in fact is not, in the United Kingdom.

I do not think it is necessary for me to add any further observations with regard to the main question. I agree that on the true construction of s. 41, a British ship on the high seas cannot be considered to be in the United Kingdom.

With regard to s. 188, I agree that that section was inserted for procedural reasons, and in any event, whatever was the purpose of that section, I am unable to construe it as meaning that where a person subject to military law commits an offence against this Act on board ship, that offence is to be deemed to have been committed at the port where the offender embarked, and unless that section is to have that meaning it does not appear to me to assist Mr. Carter's case.

I agree that this application should be refused.

OLIVER J. I agree, and I have only a word to add. The whole backbone of Mr. Carter's argument proceeded upon the proposition that it had been laid down by judges in passages which have been quoted, that a British ship on the high seas was part of the United Kingdom. I do not think, for the reasons that have been given, that those judges intended to lay down any such proposition. I think that what they said was only meant as a picturesque illustration of the principle that the jurisdiction of our Courts does apply to British ships on the high seas. In this connection it might be just as well to refer to an opinion of the great Lord Stowell, which is quoted in a foot-note on page 304 of Hall's International Law, 8th ed., cited to us by the Solicitor-General, in which these words occur: "the great and fundamental principle of British "maritime jurisprudence is, that ships upon the high seas "compose no part of the territory of a state. The surrender "of this principle would be a virtual surrender of the belligerent "rights of this country."

I need not go into the question whether principles of international law march side by side with those of criminal law, but that certainly is a very striking statement from one

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of the greatest men who ever declared the law in this country, and does not encourage one in the view that any judge has ever intended to lay down that a British ship on the high seas was a piece of England.

I have nothing to add, except to say that I entirely concur in what my brothers have said.

Application refused.

Solicitors for applicant: *A. M. Longhurst & Butler.*
Solicitor for Crown: *Treasury Solicitor.*

R. F. S.

GIBSON *v.* NORFOLK COUNTY COUNCIL.

1941
Jan. 15, 16.

Local government—Restriction of ribbon development—Compensation—Amount—Extinguishment of market value of interest in land—Expenditure necessary to render interest saleable—Restriction of Ribbon Development Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 47), *s.* 9, *sub-ss.* 1, 4.

In assessing the compensation payable under s. 9 of the Restriction of Ribbon Development Act, 1935, to the owner of an estate or interest in land which estate or interest has been injuriously affected by restrictions imposed by the highway authority under the Act the official arbitrator is confined to ascertaining the market value of the estate or interest when the land is subject to the restrictions and what would have been that market value if the land had not been so subject and awarding the owner of the estate or interest the difference. He cannot add to that sum an amount which, because of the restrictions, the owner must spend to render his estate or interest saleable.

AWARD stated in the form of a special case by an official arbitrator.

By an agreement dated September 11, 1936, it was agreed between the claimant, W. W. Gibson, a builder, and four persons, called "the landlords" in the agreement, that the claimant would hold as tenant at will certain parcels of land at Bowthorpe, Norfolk, and would build thereon four dwelling-houses, and that, when the landlords' surveyor had certified that the works had been executed to his satisfaction, the landlords would grant and the claimant would accept a lease or leases of the land with the buildings erected thereon for the term of 99 years from September 29, 1934, at a yearly rent of 3*l.* 15*s.* in respect of each plot. The land in question abutted on the Norwich-Dereham road which was a classified road to which s. 2 of the Restriction of Ribbon Development Act, 1935, applied, and accordingly, on November 23, 1936, the claimant applied, under s. 2, sub-s. 1, and s. 7, sub-s. 1, of the Act, to the Norfolk County Council, as highway authority under the Act, for their consent to the four houses which he had agreed to build being erected with access from the road. That consent was refused, but the authority gave permission

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for the erection of the houses on a certain part of the land if the claimant provided access to them by a service road which would have to be constructed at his expense. The cost of making such a service road would have been 240*l*. In May, 1937, the claimant claimed compensation under s. 9 of the Act (1), and in June, 1939, the matter was referred to an official arbitrator. At the arbitration it was agreed between the parties that the sum of 20*l*. represented the market value of the claimant's interest in the land, subject to the payment of the ground rent and other obligations under the building agreement but apart from the restrictions imposed by the Act, and the arbitrator was satisfied that those restrictions so increased the cost of development and imposed such a liability on the claimant that his interest in the land would not be saleable in the open market unless he made a payment to an assignee. At the arbitration the claimant contended that the compensation payable to him should include not only 20*l*. in respect of the lost market value of his interest in the land, but also the sum (240*l*.) which it would be necessary to pay to an assignee. The highway authority submitted that no sum was payable as compensation in excess of the market value of the claimant's interest in the land if it had not been subject to the restrictions imposed by the Act.

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(1) By Restriction of Ribbon Development Act, 1935, s. 9: "(1.) Subject to the provisions of "this section, if any person having "any estate or interest in land ". . . . subject to restrictions in "force under s. 1 or s. 2 of this "Act, proves that his estate or "interest is injuriously affected "by the restrictions, he shall be "entitled to recover from the "highway authority compensation for the injury to that "estate or interest; and any "question whether compensation "is payable under this section or "as to the amount of any compensation so payable shall, in "default of agreement, be determined by an official arbitrator "under the Acquisition of Land "(Assessment of Compensation) "Act, 1919."

(4.) "In awarding compensation under this section in respect "of any estate or interest in land, "the compensation shall, subject "to the provisions of this section, "be a sum equal to the difference "between the market value of "the estate or interest when the "piece of land is subject to the "restrictions and what would "have been the market value of "that estate or interest if the "piece of land had not been so "subject . . . ."

The arbitrator submitted the following question for the opinion of the Court: Whether the compensation payable in respect of the injurious affection of the claimant's interest in the land by the imposition of restrictions under the Act could in law exceed the market value before the imposition of the restrictions. If the Court answered that question in the affirmative he assessed the compensation at 260*l.*; if in the negative, at 20*l.*

Geoffrey Cross for the claimant. The question put to the Court by the arbitrator should be answered in the affirmative. The result of the conditions imposed by the highway authority is that the claimant's interest in the land becomes a liability which he could only transfer by making a payment to the transferee. The arbitrator found that the market value of the claimant's interest, free from the restrictions was 20*l.*, and that the sum which he would have to pay to an assignee of that interest would be 240*l.* Therefore, the damage suffered by the claimant by reason of the restrictions amounts to 260*l.* The market value of the claimant's interest when the land is subject to the restrictions for the purposes of s. 9, sub-s. 4, of the Act of 1935, which, it must be emphasized, must be read in the light of s. 9, sub-s. 1, is really this minus figure of 260*l.*, which is the difference between the transferable values of the interest before and after the injurious affection.

Simes for the Norfolk County Council. The question should be answered in the negative. The duties of the arbitrator in assessing compensation are defined by s. 9, sub-s. 4, of the Act which shows clearly that all he has power to do is to ascertain the market value of the claimant's estate or interest before the injurious affection and the market value thereof after it and to award the claimant the difference. Sub-s. 1 of s. 9 is expressed to be "subject to the provisions of this "section," which include sub-s. 4, and, therefore, sub-s. 1 must be read in the light of sub-s. 4 and not vice versa. By s. 9, sub-s. 1, compensation must be determined by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. Sect. 2, sub-s. 2, of that Act

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indicates what powers the Legislature intended to give the arbitrator under s. 9, sub-s. 4, of the Act of 1935.

HUMPHREYS J. [stated the facts and continued:] Sect. 9, sub-s. 1, of the Restriction of Ribbon Development Act, 1935, provides: "Subject to the provisions of this section, if "any person having any estate or interest in land . . . . subject "to restrictions in force under s. 1 or s. 2 of this Act, proves "that his estate or interest is injuriously affected by the "restrictions, he shall be entitled to recover from the highway "authority compensation for the injury to that estate or "interest. . . . ." If there were no other provision in the Act dealing with the matter one might well come to the conclusion that the compensation payable under the Act for the injurious affection was full compensation. It might well be thought that, where the value of an interest in land which was originally 20*l.* had been converted by the restrictions imposed by the highway authority under the Act into a liability of 240*l.*, the compensation payable in respect of that injurious affection ought to be 20*l.* plus 240*l.*, that is to say, 260*l.* But sub-s. 1 is expressed to be "subject to the provisions of "this section," and one of the provisions of the section, namely, sub-s. 4, defines the way in which compensation is to be calculated. [His Lordship read the sub-section and continued:] Those words are plain and free from ambiguity. The Act of Parliament lays down in clear terms that all the arbitrator has to do is to ascertain the market value of the interest in the land before the injurious affection and its market value afterwards, and to award the difference between those sums as compensation to the owner of the interest. In the present case the arbitrator has stated that the market value of the claimant's interest in this land was 20*l.* before the injurious affection, and that, as a result of the injurious affection, it has become worth nothing.

Mr. Cross has contended that the Court ought to tell the arbitrator that on his findings of fact he is bound to say in law that the market value of the claimant's interest in this land is minus 260*l.* If that is what Parliament intended in such a case as the present, it used peculiarly unfortunate language to indicate its intention. It was conceded by Mr. Cross (as, indeed, it must be conceded) that no one using ordinary language would say that a liability had a market value of minus something. That is not the meaning of "market value." "Market value" assumes that the thing which is said to have the market value is something which somebody will buy and that there is a market in which it can be sold, and that what the purchaser will pay for it on the average is the market value. I have never heard of the suggestion before to-day that something which has no value at all and which nobody will have because it would cost him money if he took it can be described as having a market value of minus so many pounds. Let me take this very simple case. A horse is killed and its carcass has a market value, but, if that carcass is allowed to remain in a field until it becomes a nuisance so that the owner of it has to pay 1*l.* to the local authority to carry it away and destroy it, would anyone say that the market value of that stinking carcass is minus a pound? To my mind, that would be a misuse of the English language.

The conclusion at which I arrive is that the Legislature, when enacting sub-s. 4, intended the consequences which must follow, namely, that, in assessing compensation, one must take the market value of the interest of the claimant before the injurious affection and the market value of that interest after it, and if, as a result of the action of the authority, the market value has been diminished, he is to be awarded the amount by which it is diminished. When, however, the value of the interest diminishes to zero, and, indeed, the claimant must incur expenditure to render it saleable, it would be giving a decision which comes from the heart rather than from the head to say that the claimant, as a result of the action of the highway authority, had made an extremely bad bargain because he had entered into an agreement to carry out which would, because of the restrictions, probably result in his losing money instead of making the profit that he had anticipated, and that, therefore,

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he should receive as compensation the full amount of his loss.

The only other observation which I think it necessary to make is that s. 9, sub-s. 1, provides that in default of agreement the compensation shall be determined by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. It is not uninteresting to turn, as Mr. Simes invited us to do, to that Act to see what is said about assessing compensation thereunder. In s. 2 of that Act we find : "In assessing compensation, an official arbitrator shall act in accordance with the following rules : . . . . (2.) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise." That is the same conception as one gets by the use of the words "market value" in the Act of 1935. There is assumed a sale and something in the nature of a market where there are people who will buy. I think that that puts another nail, if I may use the expression, in the coffin of Mr. Cross's arguments.

For these reasons, I think that the answer of the Court to the question which is asked of us should be in the negative.

OLIVER J. I am so fully in agreement with every word that has fallen from my Lord in his judgment that it would be a waste of time for me to review the matter further. In spite, however, of what has been said regarding the unwisdom of expressing views on the general objects of a statute, I find myself compelled to say that the building contract in this case was entered into by the claimant with full knowledge of the existence of the Restriction of Ribbon Development Act, 1935, and of the onerous conditions, including the provision of a service road, which might be imposed under it. In those circumstances Mr. Gibson made a bargain which he now finds to be a bad one, and he seeks to get compensation from public funds because he has made such a bargain. I cannot contemplate that it could ever have been the intention of the Legislature that public funds should be at the mercy of the vagaries of such speculators, and I think the claimant must take the position as he finds it, and, on the merits of the case, he has nothing of which to complain.

Question answered.

Solicitors for claimant: *McKenna & Co., for Hatch & Hatch, Norwich.*

Solicitors for Norfolk County Council: *Sharpe, Pritchard & Co., for H. C. Davies, Norwich.*

G. F. L. B.

Distinguished. THOMAS *v.* DANDO.
[1951] 1 All E.R. 1010.

1940
Oct. 23.

BUGGE *v.* TAYLOR.

Referred to. THOMAS *v.* DANDO
[1951] 2 K. B. 620

Motor car—Lighting—" Road "—Forecourt of hotel—Access by public—Road Transport Lighting Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 37), *s.* 1, *sub-s.* 1 ; *s.* 15*—Road Vehicles Lighting Regulations,* 1936 (*St. R. & O.*, 1936, *No.* 392), *reg.* 6.

During the hours of darkness a motor vehicle under the control of the appellant was left unlighted on the forecourt of a hotel. The forecourt, which was the private property of the owners of the hotel and was about 69 feet long and about 10 feet wide at one end and 20 feet wide at the other, was bounded on one side by an island public pavement, but was open to the highway at both ends. There was and had been no wall or other obstruction to prevent the public, either on foot or in vehicles, going over the forecourt, or to separate it from the highway, nor had there been any restriction on the movements on foot over the forecourt of the public who had, without let or hindrance, used the forecourt in every direction, not only to reach the hotel, but also to shorten the distance when walking from the main highway to another highway which joined the main highway at the point where the hotel was situated. On occasion public service and other vehicles had been over and through the forecourt :—

Held, that there was evidence on which the justices could find that the forecourt was a " road " within s. 1, sub-s. 1, of the Road Transport Lighting Act, 1927, and so properly convict the appellant of permitting an unlighted motor vehicle to be on a road during the hours of darkness contrary to the statute.

CASE stated by justices.

At a court of summary jurisdiction sitting at Sutton, Surrey, a complaint was preferred by the respondent, Eric Taylor, under s. 1, sub-s. 1, of the Road Transport Lighting Act, 1927, and regulation 6 of the Road Vehicles Lighting Regulations, 1936, (1) against the appellant, Ronald George Bugge, for that he, on December 30, 1939, at the forecourt of the Cock Hotel, High Street, Sutton, did permit a motor vehicle to be on a road during the hours of darkness, to wit, at 7.5 P.M., which did not carry two lamps, each showing to the front a white light visible from a reasonable distance, and a red light showing to the rear and visible from a reasonable distance contrary to the said statute and regulation.

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(1) By s. 1, sub-s. 1, of the Road Transport Lighting Act, 1927 : " Subject to the provisions " of this Act and of any regulations " made thereunder by the Minister " of Transport . . . . every vehicle " on any road shall during the " hours of darkness carry—(*a*) two " lamps, each showing to the " front a white light visible from " a reasonable distance ; (*b*) one " lamp showing to the rear a red " light visible from a reasonable " distance . . . . "

By s. 15 : " For the purposes " of this Act . . . . the express- " ion ' road ' means any public " highway and any other road to " which the public has access."

Reg. 6 of the Road Vehicles Lighting Regulations, 1936, prescribes the position of front lamps on motor vehicles.

On the hearing of the complaint the following facts were proved or admitted:

The motor vehicle in question was at the time mentioned unlighted on the forecourt of the hotel which was the private property of the owners of the hotel. The forecourt, which was about 69 feet long and about ten feet wide at one end and 20 feet wide at the other, was bounded on one side by an island public pavement, but was open to the High Street at both ends. There was and had been no wall, fence, railing, gate, or other obstruction to prevent members of the public, either on foot or in vehicles, going over the forecourt, or to separate it from the High Street, nor had there been any restriction on the movements of members of the public on foot over the forecourt. Members of the public had without let or hindrance used the forecourt in every direction, not only to reach the Cock Hotel, but also to shorten the distance when walking from the High Street to Carshalton Road which joined the High Street at the point where the Cock Hotel was situated. On occasion public service and other vehicles had been over and through the forecourt.

The justices came to the conclusion that the forecourt was a road to which the public had access within s. 1, sub-s. 1, and s. 15 of the Road Transport Lighting Act, 1927, and they convicted the appellant of the offence charged against him.

Moresby for appellant. The justices were wrong. The forecourt was not a "road" within s. 1, sub-s. 1, of the Act of 1927. It is true that "road" is interpreted in s. 15 of the Act, but that definition does not cover such a case as the present, and, in any event, an interpretation section should only be used to place a meaning on words which are ambiguous or equivocal: *Reg.* v. *Pearce* (1); Halsbury's Laws of England, 2nd ed., vol. xxxi., pp. 476, 477. There is no ambiguity in the meaning of "road" and the word should, therefore, be given its ordinary and natural meaning which is "an ordinary line "of communication used by persons passing between different "places": Murray's Oxford Dictionary; or "a public road— "a road over which the public have rights": Stroud's Judicial Dictionary. These definitions show that a "road" must be a way over which the public have some rights and which leads to and from definite points, and that cannot be said of this forecourt. When the Legislature wish the word "road" to bear an extended meaning, that meaning is carefully defined and limited: see, for example, London Traffic Act, 1924, s. 16; Road Traffic Act, 1930, s. 121, but "road" is not used in any statute relating to traffic to include any private area. *Harrison* v. *Hill* (2) is distinguishable, because the way there under consideration was clearly a "road" within the definition in the particular Act. The mere fact that the public has been allowed to pass over this forecourt does not make it a "road" within s. 1, sub-s. 1, of the Act of 1927.

Vernon Gattie for respondent was not called on to argue.

LORD CALDECOTE C.J. The question for our decision in this case is whether the forecourt of this hotel was a "road" within s. 1, sub-s. 1, of the Act of 1927 so that it can be said that the appellant's motor car was "on a road . . . during the "hours of darkness" within the meaning of the sub-section without carrying the lamps required by the sub-section and the regulations made under the Act. In *Harrison* v. *Hill* (2) the Lord Justice General (Lord Clyde) said: "It is plain, "from the terms of the definition, that the class of road intended "is wider than the class of public roads to which the public "has access in virtue of a positive right belonging to the public, "and flowing either from statute or from prescriptive user." In my view, that passage from Lord Clyde's judgment is applicable here because by virtue of s. 15 of the Act of 1927 "the expression 'road' means any public highway

(1) (1880) 5 Q. B. D. 386, 389.

(2) 1932 S. C. (J.) 13, 16.

"and any other road to which the public has access." A road which is not a public highway may, therefore, be a "road" within s. 1, sub-s. 1. The justices came to the conclusion that this forecourt was a "road to which "the public has access," and, in my opinion, there was plenty of material on which they could come to that conclusion. This appeal, should, therefore, be dismissed.

HAWKE J. I agree.

HUMPHREYS J. I agree.

Appeal dismissed.

Solicitors for appellant: *Boulton, Sons & Sandeman.*
Solicitor for respondent: *Solicitor for Metropolitan Police.*

G. F. L. B.

1940
Oct. 24.

COPEMAN *v* FLOOD (WILLIAM) AND SONS, LIMITED.

Revenue — Income tax — Profits or gains — Deductions — Company — Remuneration of directors — " Money wholly and exclusively laid " out or expended for the purposes of the trade " — Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I. ; Rules applicable to Cases I. and II., r.* 3.

In the accounts of a private company, the directors of which, who were members of the same family, owned all the shares in varying proportions, a sum of 2600*l*. was charged as the remuneration in respect of a period of between three and four months of one of the directors, a daughter, aged seventeen, who had had no previous business experience and rendered some unskilled and inconsiderable services to the company, and a further sum of 2600*l*. was charged as the remuneration for a year of another director, a son, aged twenty-four, who had worked in the business for seven years, his duties mainly consisting in calling on farmers to buy pigs from them. Of these sums the daughter drew 70*l*. and the son 277*l*., the balances remaining at their disposal in current accounts with the company :—

Held, that it was the duty of general commissioners of income tax, when considering an appeal by the company against an assessment on it to income tax under Sch. D to the Income Tax Act, 1918, to find whether the sums so charged as directors' remuneration were wholly and exclusively laid out or expended by the company for the purposes of its trade so as to be deductions proper to be made by the company under r. 3 of the Rules applicable to Cases I. and II. of Sch. D in computing the amount of its profits or gains for income tax purposes.

CASE stated by General Commissioners of Income Tax.

At a meeting of the General Commissioners for the hundred of Hemlingford, Warwickshire, on February 28, 1939, the respondents, William Flood & Sons, Ld., appealed against an assessment under Sch. D to the Income Tax Act, 1918, for the year ending April 5, 1939, in the sum of 6000*l*. in respect of profits as pig dealers carried on by them at Birmingham.

It was proved or admitted that the company was incorporated under the Companies Act, 1929, on March 22, 1937, as a private company with a capital of 1500*l*. divided into 1500 shares of 1*l*. each to take over the business of a pig dealer formerly carried on by William Flood. The directors of the company and their shareholding was as follows : William

Flood, 751 shares; S. R. Flood (his wife), 129 shares; G. A. M. Flood (his son), 300 shares; J. P. Flood (son), 300 shares; Mary Flood (daughter), 20 shares. Mary Flood, who was appointed a director on January 10, 1938, was then seventeen years of age and had left school during 1937. She was employed by the company during the whole of the year ending April 30, 1938. The sum of 2600*l.* was charged against the profits of the company as remuneration for her services from January 10, 1938, to April 30, 1938, of which sum she drew 70*l.*, the balance remaining at her disposal in a current account with the company. Miss Flood had not had any previous experience in pig dealing or in any other business. The prices to be offered for pigs were settled by the directors in conference each evening and Miss Flood's duties consisted of dealing with telephone calls made to her father's private residence by farmers inquiring the prices which would be given for their pigs. She sometimes travelled round the country with her brothers by motor-car when they called on farmers to buy pigs from them. G. A. M. Flood, who was aged 23 when the company was formed and had worked in his father's business since leaving school at the age of 17, also received 2600*l.* as remuneration for the year ending April 30, 1938, of which he drew 277*l.*, the balance remaining at his disposal in a current account with the company. During each of the three preceding years he received remuneration of 1500*l.* His duties mainly consisted of calling on farmers to buy pigs from them. The company had a very successful year to April 30, 1938, the turnover being increased by more than 150,000*l.*, but, by virtue principally of the sums mentioned, charged as directors' remuneration, a gross profit of 15,623*l.* was transformed into a loss of some 300*l.*

The question in dispute was whether the directors' remuneration charged in the accounts of the company in respect of G. A. M. Flood and Mary Flood were deductions proper to be made in determining the profits or gains of the company for income tax purposes. The appellant, the inspector of taxes, contended that it was open to the Commissioners to consider whether the sums paid or charged in the account as remuneration for the services of Mary Flood and G. A. M. Flood were in fact wholly and exclusively laid out or expended for the purposes of the company's trade, but the commissioners decided that they could not interfere with the prerogative of the company to pay such sums as remuneration to its directors as it thought fit.

The inspector of taxes appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the appellant.
Terence Donovan for the respondents.

LAWRENCE J. I am of opinion that this appeal must be allowed and the case be remitted to the Commissioners for them to consider whether the sums paid to these two directors were " money wholly and exclusively laid out or expended "for the purposes of the trade " of the company so as to entitle it to deduct them in computing the amount of its profits or gains for income tax purposes. The decision of the commissioners—that they could not interfere with the prerogative of the company to pay such sums as directors' remuneration as it thought fit—does not find that fact, which they were bound to find.

Mr. Donovan has argued that on this appeal no question arises of what amounts should have been paid to the two directors with whom we are concerned, but that the question is whether the company did charge the sums specified as directors' remuneration, and, if it did, it follows that they were wholly and exclusively laid out for the purposes of the company's trade. Therein, in my opinion, lies the fallacy of Mr. Donovan's argument. It does not necessarily follow that, because the sums were charged as remuneration, to the directors they were wholly and exclusively laid out for the purposes of the trade.

Turning again to the Commissioners' decision, it is quite true that they cannot interfere with the prerogative of a company to pay to its directors whatever it thinks fit. The only tribunal which can interfere with the company's prerogative in that matter is the High Court. The Commissioners have nothing to do with the internal economy of the company, but they can find in a proper case that sums paid by a company as remuneration to its directors are not wholly and exclusively laid out or expended for the purposes of the company's trade, and it is their duty to direct their minds to that question. The Commissioners must see whether the sums deducted by the company in computing the amount of its profits or gains for income tax purposes are sums which the company is permitted to deduct by the Income Tax Acts. A company may have paid to its directors sums as remuneration for their services in accordance with the articles of association and a resolution of the company, but it does not follow that those sums are " money wholly and exclusively laid out or expended "for the purposes of the trade " of the company so as to render them properly deductible.

The case must, therefore, be remitted to the Commissioners to find as a fact whether the sums in question were wholly and exclusively laid out or expended for the purposes of the company's trade, and, if they were not, to find how much of those sums was so laid out or expended.

Appeal allowed.

Solicitor for appellant : *Solicitor of Inland Revenue.*

Solicitors for respondents : *Evershed & Tomkinson, Birmingham.*

G. F. L. B.

1940
Nov. 18, 19, 20.

G. H. RENTON AND COMPANY, LIMITED *v.* BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Timber cargo—Policy containing Timber Trade Federation Insurance Clauses—" Including risks of . . . . non-" delivery . . . . until discharged at port of destination and whilst " in transit . . . . to final destination "—Custom of Port of London—Whole consignment unloaded at quayside—Timber sorted and piled in dock shed—Shortage found after piling—Final destination.

A policy of marine insurance covering a cargo of timber included the Timber Trade Federation Insurance Clauses, by clause 2 of which the cover was extended to include " risks of " . . . . non-delivery . . . . until discharged at port of destination " and whilst in transit by land and/or water to final destination " there or in the interior."

On the arrival of the ship at a London dock the cargo, in accordance with the custom of the port of London, was unloaded on the quayside, and afterwards sorted and piled in a shed belonging to the Port of London Authority. Until that had been done and landing returns issued the cargo-owners were unable to take possession. It was admitted that the whole of the consignment was discharged from the ship, but on the completion of the piling it was found that a number of standards were missing. The cargo owners claimed under the policy for the value of the missing timber :—

Held, that the goods had reached their final destination when they were unloaded on to the quayside, and were not afterwards in transit, and the cargo-owners were therefore not entitled to recover under the policy.

ACTION tried before Lord Caldecote C.J., without a jury.

Claim by G. H. Renton & Co., Ld., timber importers, against The Black Sea and Baltic General Insurance Co., Ld., under a policy of marine insurance.

The policy, which was dated September 20, 1938, and insured a cargo of sawn logs from Igarka to London per the steamship *Dayrose*, contained the Timber Trade Federation Insurance Clauses. No. 2 of those clauses is as follows: " Including "risks of . . . . non-delivery . . . . from the time of leaving "mill, warehouse, factory, yard or premises at the place from "which the goods are loaded into or conveyed by craft, raft "and/or lighters to the ocean-going vessel, until discharged "at port of destination and whilst in transit by land and/or "water to final destination there or in the interior . . . ."

The vessel berthed in the Surrey Commercial Docks, London, on September 23, and in conformity with the custom of the port the cargo was unloaded on to the quay alongside the ship. It was not disputed that the whole consignment of logs was discharged from the ship. Subsequently the logs were sorted and piled in a shed belonging to the Port of London Authority, and it was then found that a number of standards were missing. Until the piling was completed and the authority had issued landing returns the cargo-owners were admittedly unable to obtain possession. The cargo-owners claimed, under the policy, 200*l.* 16*s.*, the value of the missing timber.

Sir Robert Aske K.C. and *Cyril Miller* for the plaintiffs. The question is whether the missing goods had reached their final destination before they were lost. By reason of the custom of the port the receivers were unable to take possession until they had received the landing returns, showing what goods the authority held on their behalf. Until the receivers obtain possession the goods cannot be said to have reached their final destination. So far as the body of the policy is concerned it is only an insurance for the voyage, and once the cargo is landed the risk ceases, but the addition of the Timber Trade Federation Clauses extends the risk covered to transit after the voyage has finished. The " non-delivery " specified therein must be to the assured, and there can be no delivery until at least the landing return is issued, or even until the assured actually obtains possession. Goods may be in transit even if they are not being moved: *Brown v. Manchester and Sheffield Railway Co.* (1).

[*Westminster Fire Office* v. *Reliance Insurance Co.* (2); *Smith, Hogg & Co., Ld.* v. *Louis Bamberger & Sons* (3) also referred to.]

A. T. Miller K.C. and *H. L. Parker* for the defendants.

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(1) (1882) 9 Q. B. D. 230, 234.

(2) (1903) 19 Times L. R. 668.

(3) [1929] 1 K. B. 150.

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Renton (G. H.) & Co. *v.* Black Sea and Baltic General Insurance Co.

The loss is not, I submit, within the insured period. At all events the onus of proving that it is lies on the plaintiffs. Clause 2 is not an ordinary warehouse to warehouse clause as set out in Arnould on Marine Insurance, vol. i., note (f), at p. 636. Each policy must be read by itself. The risk covered in this case is that of transit, and it does not matter whether the receiver has or has not obtained his goods: see *Brown* v. *Carstairs*. (1) The insurance in this case ended on discharge at the port of destination unless the plaintiffs can show that there was a further transit beyond that point. When discharged the goods were received by the port authority, who must be treated as the agents of the receivers. The transit referred to in clause 2 must be some journey from the port of discharge, and not a mere movement from quay to shed. Even if the goods were covered until they were piled, as each piece reached the pile the cover would cease, and there was no evidence as to when any particular piece reached the pile or when it vanished.

Lord Caldecote C.J. This is a claim by the plaintiffs, who are timber importers, against the underwriters of a part cargo of sawn goods loaded on the steamship *Dayrose* for carriage from Igarka to London. A short, but not altogether easy, question on the construction of a policy of marine insurance is involved. The claim concerns a parcel of twelve standards, of which the value is 200*l.* 16*s.* The facts, so far as they are known, are not in dispute. [His Lordship then stated the facts, and continued:] The question which arises concerns clause 2 of the Timber Trade Federation Insurance Clauses, which states: "Including "risks of theft, pilferage and non-delivery, irrespective of "percentage . . . . until discharged at port of destination"— then follow these words—"and whilst in transit by land and/or "water to final destination there or in the interior." The question is: When did the risk end? I am asked by the plaintiffs to say that it continued to apply to these goods until they had reached the piles, or until the piles had been completed, or, alternatively, until the consignees were allowed to put their hands on the cargo and remove it.

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(1) (1811) 3 Camp. 161.

The question of construction which has to be decided, as applied to the facts, is whether the goods were " in transit "by land and/or water to final destination there or in the "interior." Sir Robert Aske, on behalf of the plaintiffs, contends that the stack, or what one witness said is generally called the bulk, is not the final destination, because the goods have to be sorted and piled, and the receivers did not handle the goods until that was done. I find it impossible to think that the final destination can be determined by reference to the permission or the right which the receivers got from the Port of London Authority, in due course, to handle and remove the cargo. The final destination is a question of fact. Clause 2 is a clause of the Timber Trade Federation and is intended to apply, no doubt, to cargoes and ships other than those which are loaded or discharged in the port of London. As I suggested in the course of the argument, it is not difficult to imagine cases to which the words of clause 2 apply easily without raising any question of interpretation. The goods are insured whilst in transit by land or water to final destination there or in the interior. If when the ship, completing her obligation, puts the goods overside on to the quay, and they then have to go to another part of the dock or port, either by land or by water, there is not much difficulty in seeing that the risk continues while they are in transit to the place to which they have to go. The consignees may themselves have a place of business, a shed, in the dock or at the dockside, or, as the clause says, in the interior, and in such a case there would not be much difficulty in arriving at the conclusion that the goods were covered while they were going there—in other words, while they were in transit to the place where the consignees carried on their business and where they required the goods to be sent.

The question which arises on the facts of the case is whether the timber was in transit to its final destination until the receivers obtained possession of it, or whether the final destination had been reached when the timber was discharged. In the view which I have formed the facts do not justify a conclusion that the goods were still in transit, for the purposes of this clause, after they had reached the quayside on which they were placed in bulk. If the contention of the plaintiffs is right, the final destination of a cargo which might in exceptional circumstances be taken from the pile before the piling was completed and before the counting was completed, would be different from the final destination in the case of goods which had to wait until the final piling and counting had been finished.

Certain authorities have been cited, but I cannot find very much guidance in the interpretation and application of this clause from the case to which Mr. A. T. Miller referred me, of *Brown* v. *Carstairs*. (1) The words of the clause are quite different from the words in that case. Nor do I find much assistance from *Westminster Fire Office* v. *Reliance Marine Insurance Co.* (2), in which the Court of Appeal were dealing with the following very different clause: "Including all risk "of craft to wharf or export vessel at port of discharge, and, "in the event of the goods being temporarily placed upon the "quay, it is agreed to hold the same covered while there until "delivered to the export vessel or at any wharf or warehouse "within the limits of the port." The point there taken was that as the consignee had not made up his mind to put the same into an export vessel, or on to a wharf or into a warehouse, within the limits of the port, the transit of the goods was at an end. The Court of Appeal rejected that argument; but that is a very different case from the present one, where a particular terminus ad quem is not mentioned, and where the simple words are "final destination," leaving it to be decided in each case where the final destination is.

For the purposes of this case, and this particular parcel of goods, I think the final destination was reached when the goods were discharged, and the mere fact that they had been moved to a shed or another part of it and there piled according to their marks seems to me to make no difference at all. It is quite conceivable that the goods might have been put under

(1) 3 Camp. 161. (2) 19 Times L. R. 668.

their marks and sizes as they were delivered from the ship, but according to the usage of the port the goods are bulked without regard to marks or sizes, and the fact that they were moved to another place does not, in my view, prevent the place on to which they had been discharged from being the place where they reached their final destination.

Having come to that conclusion I find it unnecessary to say anything about the further point which Mr. Miller took on the assumption that the final destination was the pile. It was said that the plaintiffs had not given any proof of non-delivery to the piles, so as to bring themselves within the policy, because the missing goods might have reached the piles, in which case the risk would have terminated because they had reached their final destination. In the absence of any evidence that any other destination was intended for these goods except this place at the quayside, I think they had reached their final destination when they were taken from the ship by the Port of London Authority, even although the task of sorting and piling the goods had still to be completed before the consignees took the goods away.

I therefore find that the plaintiffs have failed to bring themselves within the terms of the policy, and the action must be dismissed with costs.

Judgment for defendants.

Solicitors for the plaintiffs: *Wm. A. Crump & Son.*
Solicitors for the defendants: *Parker, Garrett & Co.*

A. W. G.

1940
Oct. 23, 24,
25, 28;
Nov. 5.

BURY *v.* EPPING RURAL DISTRICT COUNCIL AND ESSEX COUNTY COUNCIL.

Local Government — Town Planning—Resolution to prepare a scheme—Reservation of land for new road—Property " injuriously affected by " coming into operation of any provision contained in a scheme "—Land sold before scheme came into force—Whether compensation recoverable by former owner—Town and Country Planning Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 48), *s.* 18, *sub-s.* 1 (*a*).

By s. 18, sub-s. 1, of the Town and Country Planning Act, 1932, it is provided that: " Subject to the provisions of this " Act, any person—(*a*) whose property is injuriously affected by " the coming into operation of any provision contained in a " scheme . . . . being a provision . . . . which infringes or " curtails his legal rights in respect of that property . . . . shall, " if he makes a claim within the time limited for the purpose by " this Act, be entitled to recover . . . . compensation from the " responsible authority."

A local authority, having passed a resolution to prepare a town-planning scheme, also resolved to provide in the scheme for the construction of a new road. For that purpose they reserved certain land, including a field owned by the claimant, whose property was thereby " injuriously affected." The field consisted of land which was ripe for development, but having failed to obtain the necessary permission for interim development the claimant sold the land before the scheme received Parliamentary sanction and came into force. He now claimed compensation under s. 18, sub-s. 1 (*a*), of the Act of 1932, for injurious affection of the land during the years when it was still in his ownership, on the ground that a provision in the scheme had come into operation by reason of the resolution to prepare a scheme or the marking of the new road on the draft scheme map:—

Held (per Lord Caldecote C.J. and Humphreys J.), that a provision in a scheme does not come into operation within the meaning of s. 18, sub-s. 1 (*a*), until the whole scheme is completed and has come into operation in the manner provided by the First Schedule to the Act; that only then does the right to compensation arise; and that only a person who is at that time the owner of property injuriously affected can claim compensation.

Per Hawke J. (dissenting). The Act of 1932 should be construed on the principle laid down in *Attorney-General* v. *Horner* (1884) 14 Q. B. D. 245, 256, 257, that a statute is not to be deemed to take away private rights without compensation unless it expressly so provides. The true construction of s. 18, sub-s. 1 (*a*), is that by the use of the present tense the Act is referring not to the time when the whole scheme is completed but to the time when the injurious affection takes place, and that the owner at that time is the person to be compensated, unless he has transferred his right to somebody else.

CASE stated by an official arbitrator for the opinion of the Court.

Claim for compensation for injurious affection of property in connection with a planning scheme, under the Town and Country Planning Act, 1932.

The following statement of the facts set out in the Case is taken substantially from the judgment of the Lord Chief Justice:—

On July 8, 1927, the respondents, the Rural District Council of Epping, passed a resolution under the Town Planning Act, 1925, to prepare a scheme with respect to land within their district. The resolution was duly approved by the Minister of Health, in accordance with s. 6 of the Act. The resolution then, in the language of the section, "took effect." On September 26, 1930, the council resolved to provide in the scheme for the reservation of land in their district for the construction of a road, to be known as the North Orbital Road. Subsequently the Town and Country Planning Act, 1932, was passed, repealing and re-enacting the Town Planning Act, 1925. On July 1, 1936, the Epping Council relinquished, in favour of the respondents, the Essex County Council, all their powers and duties (except those dealing with interim development) relating to the preparation of a planning scheme under the Act of 1932. The resolution passed by the Epping Council in July, 1927, was revoked by the Essex County Council, which passed a resolution to prepare a scheme. On March 4, 1938, the county council adopted a new draft scheme, and by resolution dated October 4, 1938, made a scheme and directed that it should be submitted to the Minister of Health for approval. This was done on February 20, 1939, but the scheme had not yet been finally approved by the Minister of Health or laid before Parliament in accordance with the provisions of Part I. of the First Schedule to the Act.

The land reserved for the construction of the North Orbital Road included certain land of which the claimant was the owner, and that land formed the subject of the claim in the present proceedings. The claimant claimed a sum of 533*l.* 9*s.* 10*d.* from the respondents as compensation for the restriction against development of his land from October,

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1930, to January 31, 1930, October, 1930, being the date on which the land was reserved for the purposes of the North Orbital Road, and January 31, 1930, the date of the conveyance of the land to the Minister of Transport under a contract of sale, made in the following circumstances. The claimant considered his land to be ripe for building in 1930, and in accordance with the provisions of s. 10 of the Act of 1932 he applied on February 21, 1935, to the Epping Council for permission to develop the land. The council refused permission, and on March 28, 1935, the claimant appealed to the Minister of Health under s. 10, sub-s. 5, of the Act. Ultimately the claimant agreed to sell the land in question to the Minister of Transport for the sum of 1,425*l.* Thereupon the Minister of Health formally dismissed the appeal, the claimant having parted with his interest in the land in respect of which he had sought an interim development order.

The claim was referred to the Official Arbitrator, the question before whom was whether in the circumstances the claimant was entitled to any compensation for the injurious affection which his land had suffered while he was the owner of it. The arbitrator was satisfied (1.) that the resolution to prepare a scheme restricted the user of the land and injuriously affected the estate and interest of the claimant; (2.) that the land was ripe for development during the year 1932; and (3.) that during that year the claimant could have obtained for the land the sum of 1925*l.*; but he reserved the following questions of law for the opinion of the court:

(1.) Whether a provision in a scheme came into operation within the meaning of s. 18, sub-s. 1 (*a*), of the Act of 1932 by reason of the resolution to prepare a scheme or the marking of the North Orbital Road on the draft scheme map, or otherwise.

(2.) If the answer to (1.) be in the affirmative, whether the claimant was entitled in law to be compensated as a person whose property was injuriously affected, having sold the said land before the date of his claim.

(3.) If the answer to (1.) be in the negative, whether the claimant would be entitled in law to be compensated, as a person whose property had been injuriously affected, when the scheme was finally approved and its provisions came into operation, notwithstanding that he would not then be the owner of the land.

Should the answer of the appellate court to the above questions be in the affirmative, the arbitrator fixed the amount of compensation at 500*l.*

Montgomery K.C. and *Thomas Dawson* (for *A. W. Bowyer*, on war service) for the claimant. The resolution to prepare a scheme and the reservation of land for the purpose of a new road placed certain restrictions on the use of that land and injuriously affected the estate and interest of the claimant, as the arbitrator has found, in his property. When the resolution was confirmed by the Minister of Health a provision in the scheme, namely, the reservation of the land, at once became operative and the claimant is entitled to compensation under s. 18, sub-s. 1. The injurious affection must relate both to the past and to the future. If the land has been injuriously affected while it is in the ownership of the claimant he is the person whose property during that period is injuriously affected by the coming into operation either of a provision in a scheme or of the scheme itself. If s. 18, sub-s. 1 *(a)*, is to be read as dependant on the coming into operation of the whole scheme, and not merely of a provision contained in it, then the payment of compensation will not become due until after the scheme has come into force: see s. 22, sub-s. 2. That compensation is to be given in respect of a past period is made clear by s. 18, sub-s. 2, because that sub-section provides that in awarding compensation additional compensation is to be given if an interim development order has been refused on appeal to the Ministry. The compensation is to date back to the commencement of the injurious affection. The question whether the claimant is restrained from obtaining compensation by reason of the fact that at the date of his claim he was no longer the owner of the property, depends, it is submitted, on whether the claimant is a person whose property "is injuriously affected." The sub-section is drafted in the present tense and refers to the owner at the time of the injurious affection. "Is" should be read as "shall be at any period." The Act of 1932 is a statute which interferes with rights of property, and on the principle laid down in *Attorney-General* v. *Horner* (1) should not be construed as taking away private rights without compensation unless it expressly so provides.

Harold B. Williams for the respondents. There can be no coming into operation of any provision contained in a scheme until the whole scheme comes into force, for before that happens the particular provision which causes the injurious affection may be withdrawn or may be struck out by the Minister. Sometimes it is many years before a scheme comes into operation and sometimes it never does so. In the latter case the property owner gets no compensation at all. Various sections of the Act of 1932 deal with the "responsible "authority." That authority, it is submitted, cannot come into existence until the scheme comes into operation. Wherever the word "scheme" is used in the Act it means perfected scheme, and wherever an embryo scheme is referred to it is called a "draft scheme." The claimant is not now entitled to compensation, nor will he be entitled when the scheme comes into operation. The words of s. 18, sub-s. 1 (*a*), are "whose property is injuriously affected." The whole sub-section is in the present tense, and you cannot have a person whose property *is* injuriously affected unless he is the owner at the time when the scheme affecting it comes into operation. If the claimant is right, s. 18, sub-s. 2, is entirely unnecessary, as the greater includes the less.

Cur. adv. vult.

1940. Nov. 5. LORD CALDECOTE C.J. [having stated the facts, continued]: When the case was argued before us Mr. Montgomery, on behalf of the claimant, took the time which, by the finding of the arbitrator, was the time when the land was ripe for development as the date when the injurious affection in respect of which his client was claiming began, and submitted that the claimant is entitled to compensation for the injurious affection of the land between that date, namely, 1932, and the date when he sold the land, January 31, 1939.

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(1) (1884) 14 Q. B. D. 245, 256, 257.

The claimant's rights depend upon the answers to certain questions which have been submitted to us by the Official Arbitrator. The first question is whether a provision in a scheme has come into operation within the meaning of s. 18, sub-s. 1 (*a*), of the Act of 1932 by reason of the resolution to prepare a scheme or the marking of the North Orbital Road on the draft scheme map, or otherwise. For the purpose of answering this question it is necessary to look closely at the provisions of the Act. Sect. 18 is the first of a group of sections dealing with compensation and betterment. It provides that "Subject "to the provisions of this Act, any person (*a*) whose property "is injuriously affected by the coming into operation of any "provision contained in a scheme . . . . shall, if he makes a claim "within the time limited for the purpose by this Act, be "entitled to recover" compensation. Does the claimant's claim come within these words? Before a scheme can come into operation certain conditions required by the Act have to be satisfied. Under the provisions of the First Schedule, Part I., para. 3, a scheme "shall be capable of coming into "operation in accordance with the provisions of Part II. of "this Schedule unless" either House of Parliament resolves that the scheme ought not to come into operation or the Minister undertakes to modify the scheme. Part II. of the First Schedule then provides that the scheme "shall "become operative" at the expiration of six weeks from the date of publication of a notice stating "that the scheme has "been laid before both Houses of Parliament and is capable "of coming into operation."

We were asked to say that the claimant's property was injuriously affected by the coming into operation of a provision contained in a scheme, the provision being the reservation of the land for the North Orbital Road, and that this provision came into operation within the meaning of s. 18 notwithstanding the fact that the scheme itself had not reached the final stage and had not come into operation. In fact, the scheme has not yet been finally approved by the

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Minister of Health, or been laid before Parliament. If s. 18, sub-s. 1 (*a*), is read alone, and for the first time, the interpretation put upon it by Mr. Montgomery is attractive, but I have come to the conclusion that the contention of the respondents is the right one, and that the words in question must be read as only applying to a case where the scheme itself has come into operation. I have come to this conclusion as a result of an examination of the Act as a whole and, more particularly, of s. 18. Discussion took place as to the meaning and effect of sub-s. 2 of s. 18. If s. 18, sub-s. 1 (*a*), is construed as I think it should be, sub-s. 2 presents no difficulties. The Act gives compensation to the owner of land which is injuriously affected by some provision contained in a scheme which has come into operation. If, meanwhile, in addition to the injury thus caused, the owner of the land has suffered any additional injurious affection of his property because he has been refused an interim development order, account must be taken of this in awarding the compensation payable in respect of injurious affection under the provisions of s. 18, sub-s. 1 (*a*). The claimant, however, bases his claim not upon sub-s. 2 but upon the provisions of sub-s. 1 (*a*). In order to succeed he must bring himself within the words of the sub-section. The construction placed by Mr. Montgomery upon its language seems to me to give no proper effect to the words "whose property" in the context in which they appear. I find difficulty, moreover, in seeing what effect could be given to the provisions of sub-s. 2 if Mr. Montgomery's interpretation of sub-s. 1 (*a*) is accepted.

It is unnecessary to set out in detail the various provisions in this elaborate and difficult Act, but a careful examination of them confirms me in the opinion which I have formed. A scheme begins with a resolution ; ss. 6 to 9 inclusive provide for procedure with respect to schemes. If the owner of land desires before the scheme comes into operation to develop it, he may apply for what is called the "interim development" of his land. If such an order is obtained, the rights of the owner of the land will be protected. If an order is refused, he will then be in a position, when he subsequently becomes entitled to compensation under s. 18, sub-s. 1, to recover something for the additional injurious affection due to the refusal of an interim development order. The provisions of the Act as to the time within which claims can be made, and particularly the provisions of s. 24, which enable the responsible authority to withdraw any of the provisions of the scheme which have given rise to a claim for compensation, seem all to point in the same direction.

For these reasons a provision in a scheme cannot, in my opinion, come into operation within the meaning of s. 18, sub-s. 1 (*a*), until the scheme itself is completed and has come into operation. The answer to the first question is therefore in the negative.

That brings me to the third question stated by the arbitrator, namely, whether the claimant will be entitled in law to be compensated when the scheme is finally approved and its provisions come into operation, notwithstanding that he will not then be the owner of the land. In my opinion the answer to that question is also in the negative. The point of time at which a right to compensation for injurious affection under s. 18, sub-s. 1 (*a*), arises is the coming into operation of the scheme. It seems to follow that only a claimant who is the owner of the property affected by the coming into operation of the scheme can claim the compensation given by s. 18, sub-s. 1 (*a*).

It was suggested in the course of argument that if these conclusions are right the Act gives no compensation for a plain injury which the claimant has suffered. I do not take that view. The claimant might have continued to own the land until the scheme came into operation, in which case he would have become entitled to receive compensation in accordance with the provisions of s. 18. If, on the other hand, he chose to sell the land before the scheme came into operation, he might expect to obtain a price which took into account the compensation given in one form or another by the Act. The duty of this Court, however, is to give effect to the provisions of the Act, whatever the result may be. I have not overlooked the submission made for the claimant that the consideration of the Act must be approached through the way indicated in

Attorney-General v. *Horner*. (1) The answers which I have given to the questions submitted to us, however, are those which seem to me to be required by the plain provisions of the Act.

HAWKE J. As I am in a minority in this matter, and these proceedings are final, my judgment is quite unimportant, but I desire to explain shortly my views upon the two matters which lead to my difference of opinion with my brethren.

The respondents contend that, inasmuch as the claimant sold the property affected before making his claim for injurious affection and before the scheme became final, he can never recover anything in respect of any injurious affection occurring while he was the owner. Whether this is so is a matter of construction, principally of s. 18 of the Act. It is, I understand, common ground that in the sale to the Minister of Transport he did not transfer such right, if any, as he had to compensation for injurious affection. That there was injurious affection is found as a fact. Are the respondents, then, to escape all liability for it, merely because at the moment of his claim the claimant can no longer say: "I am still the owner "of this property"?

Although the point is, without doubt, one of difficulty, that is not, in my opinion, the true position. Having regard to the nature of the Act of Parliament, interfering as it does with proprietary rights, its provisions should be construed on the principle laid down in *Attorney-General* v. *Horner* (1), followed by the Court of Appeal in *Bond* v. *Nottingham Corporation* (2), and it is on that principle of construction that I partly base my view. The respondents' chief argument against that view is that by s. 18, sub-s. 1, having regard to the fact that it is expressed in the present tense, compensation is given only to the person who is the owner of the property at the time when the scheme comes into operation as a perfected and completed scheme, and that the scheme even now has not been perfected: see Parts 1 and 2 of Schedule I. to the Act of 1932.

In my opinion, however, the true construction of the section

(1) 14 Q. B. D. 245, 256, 257.

(2) [1940] Ch. 429, 435.

is that by the use of the present tense the Act is referring not to the completion of the whole matter, but to the time when the injurious affection takes place, and that the owner at that time is the person to be compensated, unless, indeed, he has transferred his right to some other person meanwhile. Obviously, and apparently admittedly, the inception of the scheme may interfere substantially with proprietary rights of development. To adopt the construction contended for by the respondents would be to interfere still further with the owner's rights.

Does the statute mean that persons who are injuriously affected are not only subject to this general interference with their rights, but are also sentenced, lest they should lose their right to be compensated, to remain owners during the perhaps interminable delays to which such schemes are apparently subject? In my opinion, the owner does not lose his rights in this matter by parting with the property.

The second point is whether s. 18, sub-s. 1 (*a*), in speaking of the "coming into operation of any provision contained in a "scheme," means coming into operation of a "completed "scheme." If the statute had intended that it should have said so, and it does not appear to do so, certainly not expressly. The word "scheme" can have many meanings. Its ordinary meaning, as given in the dictionary, is "plan," which is often used to express intentions as to a course of action. Sect. 18, sub-s. 1 (*a*), does not refer to the coming into operation of a "scheme," as I have already pointed out. It expressly refers to the coming into operation of a "provision contained in a scheme" which may mean a part of a proposal or plan. That, in my opinion, shows that it is not the "coming into operation" of the whole scheme that is essential, but that of one of the provisions of the scheme. I, therefore, conclude that the words "the coming "into operation of any provision" mean the time when the provision in question takes effect on proprietary rights. I cannot but think that injurious affection by reason of such a provision constitutes a taking effect of the provision.

HUMPHREYS J. I agree entirely with the judgment which has been delivered by the Lord Chief Justice, but as the court is not unanimous I think it desirable to state, though quite shortly, the reasons which have caused me to arrive at that conclusion. I am content to base my judgment solely on the language of s. 18 of the Act.

It is not disputed that the claimant was, up to January, 1939, the owner of property which was at some time injuriously affected by a provision contained in a draft scheme prepared by Epping Rural District Council. The particular provision affecting the property of the claimant was one relating to the construction of a road, to be called the North Orbital Road, and was inserted in the scheme in 1930. Nor is it disputed that, if the claimant had continued to own the land at the time when that provision of the scheme came into operation, he would be entitled to recover from the responsible authority, as compensation, the amount by which his property was decreased in value. So much is clear from the language of s. 18. The scheme has not yet come into operation, and the claimant sold the property in question in January, 1939.

The case stated by the arbitrator raises two points, and the court is invited to answer two questions. I say two, because whether it is necessary to answer the third depends on the answer to the first. The first question is: "Whether a provision in a scheme came into operation within the meaning "of s. 18 of the Act of 1932, by reason of the resolution "to prepare a scheme or the marking of the North Orbital "Road on the draft scheme map, or otherwise." The effect of the answer to that question is to decide whether the claimant rightly brought his claim at the time when he did, as being a person who was then entitled to compensation under s. 18. In my judgment, the question must be answered in the negative.

Since it is clear that the scheme itself has never come into operation, the claimant can only succeed if he can establish that the provision affecting his property came into operation at some date before his claim, and so in advance of the coming into operation of the scheme as a whole. I can find nothing either in the facts as stated in the case, or in the language of the section, which supports that contention. The language of s. 18 appears to be plain and free from ambiguity. No reference is made in the section to the scheme coming into operation, for the simple reason that the scheme itself can give no right to compensation. In any case, where the right to compensation exists it must be because some particular provision, or provisions, injuriously affects or affect the property of a person, who thereby becomes entitled to make a claim. The only possible answer to the question when the provisions of the scheme come into operation is, I think, that the provisions which together make up the scheme do not come into operation until the draft scheme has ceased to be merely a series of proposals and become an operative instrument binding upon all bodies and persons mentioned in it. In other words, the various provisions come into operation when the scheme comes into operation.

The scheme in question, if it ever comes into operation, will do so at the expiration of six weeks after the serving of a certain notice as provided in para. 4 of Part II. of the First Schedule to the Act. It is common ground that that date has not yet arrived. Until that date no provision can, in my opinion, be said to be in operation unless there is something in the scheme itself to indicate a contrary intention.

The third question which is asked is: "If the answer to "question 1 be in the negative, whether the claimant would be "entitled in law to be compensated, as a person whose property "had been injuriously affected, when the scheme was finally "approved and its provisions came into operation, notwith-"standing that he would not then be the owner of the said land." I answer this question also in the negative. The answer really depends on the answer to the first question. The material date as assumed in this question and as provided in s. 18 is the date when the provisions of the scheme come into operation. If my brother Hawke is right in the view which he takes as to the date when this provision came into operation, then, no doubt, the claimant has always been entitled to make a claim at any time he might choose, but, if I am right in my view as to that date, it is clear that the claimant will

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not then be a person whose property is injuriously affected by the coming into operation of the provisions of the scheme, since he has already ceased to be the owner of any property affected by the scheme or by any of its provisions.

For these reasons I agree with the judgment of the Lord Chief Justice.

Questions answered.

Solicitors for the claimant: *Montagu's and Cox & Cardale.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for E. S. Holcroft, Chelmsford, Clerk to the Essex C.C.*

A. W. G.

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Insurance (*Marine*)—*War risks—Policy " warranted free of any claim " based upon loss of, or frustration of, the insured voyage or adventure " caused by . . . . restraints . . . . of . . . . princes "—British cargo in German ships—Outbreak of war—Deviation to neutral port by order of German government—Subsequent departure for Germany—Ship scuttled with cargo—Arrival of ship and cargo in Germany—Constructive total loss—Liability of underwriters—Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 49, *sub-s.* 1 (*a*), (*b*) ; *s.* 60.

By Lloyd's policies of insurance against marine and war risks cargoes belonging to the plaintiffs, who were British subjects, and shipped in three German vessels, the M., the W., and the H., for various destinations in August, 1939, were insured by the defendants and other underwriters against " enemies . . . . " restraints and detainments of all kings, princes and people," and, by incorporation of the Institute War Clauses, against the risks excluded from the standard form of English marine policy by an f. c. and s. clause, and loss or damage caused by " hostilities " warlike operations . . . . " Each policy provided : " Warranted " free of any claim based upon loss of, or frustration of, the " insured voyage or adventure caused by arrests restraints or " detainments of kings princes peoples . . . . " Each policy, by incorporation of clauses and bill of lading liberties, made the ship free to deviate or change her voyage.

The voyages were begun before the outbreak of war between Great Britain and France and Germany on September 3, 1939, but on August 24, the M., on September 1, the W., and on September 6, the H., put in at neutral ports in obedience to orders by the German government that the masters should so take refuge and, if possible, return to Germany with their cargoes, or, as a last resort, scuttle their vessels. The M. and the H. left their ports of refuge some weeks after the outbreak of war in an attempt to reach Germany, but were eventually scuttled in the presence of Allied warships. The W. succeeded in reaching Germany in March, 1940.

No notices of abandonment were given by the plaintiffs to the underwriters, but in actions brought by the plaintiffs for the loss of the cargoes the underwriters agreed to waive the absence of notice and the cases were argued on the assumption that due notice had been given at the proper time :—

Held, by the Court of Appeal, that the deviations of the ships from the contractual voyages to neutral ports, their departures

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from those ports in attempts to reach Germany, the scuttling of the M. and the H. and the bringing of the W. and her cargo to Germany, were the acts of the German government through their agents, the masters of the ships; that when the ships were diverted towards the ports of refuge the German government through the masters received actual possession of the cargoes and thereafter retained it, and that either when the masters determined to obey the orders of the German government or when, in pursuance of those orders, they left the neutral ports for Germany, the German government converted the cargoes to its own use, and there then resulted to the plaintiffs a constructive total loss of the cargoes caused by a peril or perils within the policies; that the frustration clause in the policies did not bar the plaintiffs' claims because that clause only applied where no claim could be put forward for the loss of insured goods apart from the loss of the adventure and the plaintiffs' claims were for the loss of the goods and not for that of the adventures; that, on the construction of the policies and the clauses attached to them, the policies were still in force when the ships left the ports of refuge; and that, therefore, the plaintiffs were entitled to recover.

Per MacKinnon L.J. The deviations to the neutral ports were excused under s. 49, sub-s. 1 (*a*) of the Marine Insurance Act, 1906, as being authorized by the policies, or under s. 49, sub-s. 1 (*b*), as being caused by circumstances beyond the masters' control.

Decision of Hilbery J., reversed.

APPEAL from Hilbery J.

The plaintiffs were at all material times the owners of goods shipped in the steamships *Minden*, *Wangoni*, and *Halle* respectively. Each of these ships was German owned. The goods shipped were insured under Lloyd's marine and war risks policies by the defendants and other underwriters for the voyages specified hereafter against perils "of the seas, men-of-"war, fire, enemies, pirates, rovers, thieves, jettisons, letters of "mart and countermart, surprisals, takings at sea, arrests, "restraints and detainments of all kings, princes and people, "of what nation, condition, or quality soever, barratry of the "masters and mariners, and of all other perils, losses and "misfortunes that have or shall come to the hurt, detriment or "damage of the said goods and merchandises, and ship, etc., or "any part thereof"; and also, by incorporation of the Institute War Clauses, against (clause 1) "(*a*) the risks excluded from "the standard form of English marine policy by the clause: "'Warranted free of capture seizure arrest restraint or "'detainment, and the consequences thereof or of any attempt "'thereat; also from the consequences of hostilities or warlike "'operations, whether there be a declaration of war or not, "'civil war, revolution rebellion insurrection or civil strife "'arising therefrom, or piracy.' (*b*) loss of or damage to the "'property hereby insured caused by: (1.) hostilities warlike "operations civil war revolution rebellion insurrection or "civil strife arising therefrom. (2) mines torpedoes bombs "or other engines of war."

Clause 10 of the clauses for shipment from South America, which were also attached to the policy covering the cargo shipped in the *Minden*, provided: "Held covered, at a premium "to be arranged, in case of deviation or change of voyage ". . . . In the event of the exercise of any liberty granted to the "shipowner or charterer under the contract of affreightment "whereby such contract is terminated at a port or place other "than the destination named therein, the goods are held "covered in terms of these clauses at a premium to be arranged "until sold and delivered at such port or place or notice be "given to underwriters to terminate the policy whichever "first occurs; or, if the goods be forwarded to the destination "named herein or to any other destination, until arrival at "destination." By clause 12: "Including all liberties as "per contract of affreightment. . . ." By clause 13: "With "leave to call and stay at all ports and places, in any rotation, "in or out of the customary route for all purposes whether "necessary or otherwise. . . ." By r. 2 of the bill of lading rules: "Ship to be at liberty to call at any ports in or out "of the customary or advertised route in any rotation and "for any purpose. . . ." By a "war clause" attached to the bill of lading: "When and so long as a state of war exists "and/or so long as any control over the use or movements "of the vessel is exercised by any government . . . . the carrier "and/or his agents and/or the master may (if in his or their "uncontrolled discretion he or they think it advisable) at any "time before or after the commencement of the voyage alter "or vary or depart from the proposed or advertised or agreed "or customary route, and/or delay or detain the vessel at or

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"off any port or place and/or tranship the cargo at any port "or ports, place or places without being liable for any loss or "damage whatsoever directly or indirectly sustained by the "owner of the goods. The ship in addition to any liberties "expressed or implied herein, shall have the liberty to comply "with any orders or directions as to . . . . routes, ports of call, "stoppages . . . . discharge or destination, or otherwise how"soever given by any government . . . . and if by reason of and "in compliance with, any such orders or directions, anything "is done or not done, the same shall not be deemed a deviation ". . . ."

The policy covering the goods shipped in the *Wangoni* further provided, by incorporation of the Institute F.P.A. Clauses, for insurance "against all and every risk of loss and/or "damage from any cause whatsoever" and a clause attached to the bill of lading provided: "If one of the following incidents "or one of the following measures occurs or threatens to occur, "that is to say, war between any peoples; civil war; pro"hibitions, restrictions or control by any government of "traffic, trade or by any other means, with any country "from which or to which the ship normally sails; control or "disposal by any government or authority of the use or "movement of the ship . . . . the shipowner (or his representa"tive) is entitled, if he considers that the ship, her master, "officers, crew, passengers or cargo are subject, either wholly "or in part, as a result of the incidents or measures referred "to above, to loss, damage, contravention or detention, or to "suffer delay, to alter the journey either before or after its "commencement, or to vary the anticipated, agreed or usual "voyage, or to detain the ship, or to delay the voyage." The policy covering the goods shipped in the *Halle* further provided, by incorporation of the Timber Trade Federation Insurance Clauses, 1938 (clause 2), for insurance of the cargo against "all "risks . . . . whilst on board the ocean-going vessel until dis"charged at port of destination . . . . and all liberties and "liabilities as per bill of lading or contract of affreightment." The bill of lading gave the *Halle* "liberty to call at any ports "in any order" and a war clause attached provided: "The "carrier, in addition to any liberties expressed or implied "herein, shall, in the event of the imminence or existence of "war, hostilities or warlike operations between any nations ". . . . and measures taken by any governments in consequence "of or connected with any of the above matters, have the rights "and liberties as set out in the war risk clause incorporated in "this bill of lading. Anything done or not done by reason of "or in compliance with these clauses is within the contract "voyage. . . . ." [No other war risk clause was incorporated in the bill of lading.]

The policies contained sue and labour clauses and they then provided: "Warranted free of any claim based upon loss of, "or frustration of, the insured voyage or adventure caused by "arrests restraints or detainments of kings princes peoples "usurpers or persons attempting to usurp power."

The policies incorporated the Institute Strike and War Clauses, which provided: "Held covered at a premium to be "arranged in case of deviation or change of voyage or other "variation of the adventure by reason of the exercise of any "liberty granted to the shipowner or charterer under the "contract of affreightment. . . . ."

All the plaintiffs and defendants were British subjects.

In the first case (hereinafter called "the *Minden*") the insured voyage was from a South American port to Hong Kong and/or Shanghai. In the second case (hereinafter called "the *Wangoni*") the insured voyage was from Bremen to Cape Town. In the third case (hereinafter called "the "*Halle*") the insured voyage was from Bunbury, Australia, to London, via the Cape of Good Hope.

The *Minden* sailed from Buenos Aires with Durban as her first port of call and with the insured goods on board shipped under bill of lading dated August 16, 1939. On a normal voyage she would have reached Durban on or about September 15, 1939. The course of the vessel was due east, but on August 24 she arrived at Santos, Brazil, sailed again the same day, and arrived at Rio on August 25. She stayed there until September 6, three days after the outbreak of war, and then sailed, evidently to return to Germany. On September 29, in the presence of a British warship, she was scuttled by those on board her off the Faroe Islands and was lost with all her cargo, including the insured goods. The *Wangoni* sailed from Bremen bound for South Africa with the insured goods on board under bill of lading dated August 12, 1939. On a normal voyage she would have reached Cape Town on or about September 12. In fact, she arrived at Las Palmas on August 29, but the same day she sailed back from there to Vigo, Spain, arriving there on September 1. She remained at Vigo until February 10, 1940, when she sailed for Hamburg, where she arrived on March 5. The *Halle* sailed from Bunbury with the insured goods on board shipped under bills of lading dated July 27, 1939. She passed the Cape of Good Hope on August 18 and on a normal voyage would have arrived in London on or about September 16. In fact, she took refuge at Bissao, Portuguese Guinea, a neutral port, on September 6. She sailed from Bissao on October 13, and on October 16, in the presence of a French warship, she was scuttled by those on board her and was lost with all her cargo, including the insured goods.

It was agreed between the parties that on and after September 3, 1939 (when war was declared between Great Britain and Germany), there was risk of capture whenever any one of the ships was outside the territorial waters of any neutral state; that, as from that date, there was an effective blockade of all German ports by the British and French naval forces, who were taking all possible steps to intercept, capture or destroy all German merchant vessels on the high seas; and that at all material times the German Government, in furtherance of German war policy, had taken control of all German owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels.

In the cases of the *Minden* and the *Halle* the plaintiffs claimed under their respective policies as for a total loss of the insured goods through the scuttling of the ships, or, alternatively, as for a constructive total loss on the ground that after the beginning of the voyages the captains of the ships, acting on the orders of the German government, proceeded to neutral ports and thence towards Germany with the intention of holding the cargo for and to the order of the German government or of not delivering it to or for the plaintiffs. In the case of the *Wangoni* the plaintiffs claimed as for a total loss of the goods on the ground that during the stay of the ship at Vigo it was impossible for them to obtain possession of the goods, or, alternatively, impossible for them to obtain possession of the same except on payment to the Rotterdam agents of the shipowners of the full freight and a percentage of the value of the goods for calling at a port of distress according to the German Commercial Code, and the performance of other conditions, which, the plaintiffs alleged, in view of the prevailing state of war, it would have been illegal for them to pay or perform. Further, the plaintiffs said, after the ship had left Vigo it was impossible for them to obtain possession of the goods, or, alternatively, it was impossible for them to obtain possession of the goods except in Germany on the performance of the conditions mentioned which it would have been illegal for them to perform. Alternatively, the plaintiffs claimed as for a constructive total loss on the same grounds as the claims as for constructive total loss were made in the cases of the *Minden* and the *Halle*.

The defendants, by their defences, denied any total or constructive total loss of the insured goods, or any loss proximately caused by perils insured against, and they claimed that the voyages were abandoned and the risks under the policies thereby ended. Alternatively, they said that the policies were expressly warranted free of any claims based upon loss of, or frustration of, the insured voyages or adventures caused by arrests, restraints or detainments of kings, princes or peoples, and that the claims were based upon loss so caused.

By their counterclaims the defendants said that, if there was any loss by perils insured against and if the voyage was not frustrated or abandoned, or the insurance was not void or avoided for illegality, the ships deviated from, or alternatively, changed the voyages insured, and by the express terms of the policies the goods were only held covered at an

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additional premium to be arranged, and no additional premiums had ever been tendered or paid, and they claimed declarations that they were entitled to reasonable additional premiums to be assessed.

By their reply, the plaintiffs denied that the voyages had been abandoned, or that the risks were ended, or that there were changes of voyage or deviations. Alternatively, the abandonments, changes of voyage and deviations were due to circumstances beyond the control of the masters and owners of the ships, or were reasonably necessary for the safety of the ships or cargoes, or were occasioned by the barratrous conduct of the masters or crews. Alternatively, the captains so acted on the orders of the German government. Any abandonments, deviations or changes of voyage were, therefore, justified. They admitted that no additional premiums in respect of any deviations or changes of voyage were ever tendered or paid, but they denied that any were due.

Although the plaintiffs had not given the underwriters any notices of abandonment, the underwriters agreed to waive the absence of notice and each case was argued as if due notice had been given at the proper time.

Hilbery J. held, in each of the three cases, that when the ship left the neutral port there was a loss of the insured goods by restraints of princes and people, and, possibly, also a loss under the peril described in the policy as "enemies," but the loss was brought about by loss of, or frustration of, the insured voyage or adventure caused by restraints of princes or peoples within the frustration clause. Moreover, the loss did not occur while the policy was in operation, the adventure having been frustrated and the insured voyage having been totally abandoned at the neutral port and the "held covered" clause incorporated in the policy not being capable of being construed as covering such an adventure as the master of the ship undertook when he weighed anchor at the neutral port and set out for Germany. The plaintiffs could not, therefore, recover as for a constructive total loss. With regard to the claims as for actual total loss arising out of the scuttling of the *Minden* and the *Halle*, those ships, when trying to run the Allied blockade and reach Germany were engaged in a warlike operation so that the loss of the insured goods was a consequence of warlike operations. In law, also, the ships were captured at the time of the scuttling. For the reasons given, however, the loss did not occur while the policy was in operation and the plaintiffs could not recover.

The plaintiffs appealed.

Sir Robert Aske K.C. and *Cyril Miller* for the plaintiffs. The plaintiffs are entitled to succeed. Their claims are not barred by the frustration clause. There was here a constructive total loss of the cargoes for which the plaintiffs are claiming apart from the loss of the adventures. There is no authority for the proposition that there can only be a constructive total loss of cargo when there is a loss of the adventure. The frustration clause only operates to protect underwriters against claims for loss of goods which are based on the loss of, or frustration of, the insured voyage or adventure, and not against claims for loss made on grounds other than the loss of the voyage or adventure as is the case here. A claim for the loss of the adventures does not form any ingredient of the plaintiffs' claims. Hilbery J. accepted the argument that, because there was a loss of the adventures and the same facts constituted the loss of the adventures and the loss of the goods, the plaintiffs' claims must be based on the loss of the adventures, and that, consequently, the frustration clause operated to protect the underwriters. There is no authority to support that. Whenever a ship sinks at sea there is a loss of the adventure, but that does not prevent independent claims by the cargo owners for loss in respect of the cargo. *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1) is the basis of the underwriters' case, but in that case the goods were not lost to the owners whose loss arose from loss of market. *Miller* v. *Law Accident Insurance Co.* (2) and *Rodoconachi* v. *Elliott* (3), also relied on, were cases, not of loss of goods, but of prevention of delivery at the places

(1) [1916] 1 A. C. 650.
(2) [1903] 1 K. B. 712.
(3) (1874) L. R. 9 C. P. 518.

of destination. In Bullen and Leake, 3rd ed., p. 183, the precedent is for a claim simply for loss of the cargo, nothing being said about the adventure. The plaintiffs' claim for loss of their goods is therefore unaffected by the frustration clause, they having suffered a commercial loss quite independent of the loss of the voyages. The seizure of the goods took place before the frustration of the voyages and the plaintiffs' claim in respect of that seizure cannot be said to be based on the loss of, or frustration of, the voyage. When the German captains decided to obey the orders of their government and seized the cargoes on behalf of that government, there was a conversion of the goods by that government at common law. This would not be affected by the possibility of a British ship seizing the German ship and regaining possession of the goods. There was then an actual total loss of the goods, within s. 57, sub-s. 1, of the Marine Insurance Act, 1906.

[MacKinnon L.J. It is not necessary for you to prove actual total loss. It is sufficient to prove constructive total loss of the goods but not of the voyage.]

There was a constructive total loss of the goods as soon as the master determined to hold the goods according to the orders of the German Government. That took place before there was any loss of the adventure and before there was any change of voyage. There is no change of voyage until there is an outward manifestation of the master's determination to change the voyage. The act of scuttling the ship with her cargo was merely a part of the original seizure of the goods by the master acting for the German Government.

[Scott L.J. It is immaterial whether the scuttling took place early or late in the voyage. It is merely ex post facto evidence to show the orders of the German Government.]

The seizure of the goods and the resulting scuttling are really one event. It was a taking by enemies which is covered by the policy. Capture is always prima facie a constructive total loss from the moment of capture. In the *Wangoni* case, it was plain that the recovery of the goods was neither a commercial proposition, nor was it likely. [*Robertson* v.

Petros M. Nomikos, Ld. (1), and *Carras* v. *London & Scottish Assurance Corporation* (2) were referred to.] The divergences of the ships to neutral ports did not constitute the abandonment of the voyages so as, as is alleged, to release the underwriters. They were merely deviations which did not vitiate the policies because they were authorized by the policies by virtue of the clauses attached thereto: see s. 49, sub-s. 1 (*a*), of the Marine Insurance Act, 1906. Since the masters deviated from the prescribed voyages before the outbreak of war, the fact that the orders of the German Government were then in existence does not affect the legal relations between the parties. Up to the outbreak of war the contracts of affreightment on which the rights of the parties depend remained perfectly valid, and the outbreak of war took place after the *Minden* and the *Wangoni* arrived at neutral ports. The contracts of affreightment were, therefore, legal, and the liberties in that contract entitled the ship to deviate from her prescribed voyage.

In the defence there is an allegation that the voyage was abandoned, but there is no conception of abandonment of voyage in marine insurance, merely a change of voyage. Abandonment of voyage is not referred to in the Marine Insurance Act, 1906. In the note to s. 45 in Chalmer's Marine Insurance Act, 1906, 4th ed., p. 61, it is stated that "Three "different states of fact must be distinguished. First, the "ship may sail on a voyage not contemplated by the policy. "In that case the risk does not attach. See ss. 43 and 44. "Secondly, a ship may commence the adventure insured, "but afterwards change her destination. There is then a "change of voyage. In that case the risk attaches, but is "afterwards avoided. Thirdly, a ship may proceed from the "terminus a quo to the terminus ad quem, but sail thither "by an improper track. In that case there is a deviation." The only case of an abandonment of voyage is where the ship never sails. Sects. 43 and 44 deal with the first of the three heads. That state of facts does not arise here. Sect. 44 deals with a ship sailing for a destination other than that

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(1) [1939] A. C. 371.

(2) [1936] 1 K. B. 291.

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specified in the policy. Sect. 45 deals with change of voyage, and s. 46 deals with deviation. The same explanation is given in Arnould's Marine Insurance. To use the term "abandonment of voyage" is on the facts of the present case to use an improper term. It was really a change of voyage. The held covered clause does not apply, but if it does apply it applies both to change of voyage and also to deviation. An involuntary change of voyage, such as that here, since the masters were acting under the orders of the German Government, has no effect on a policy, but the involuntary character of the change must be clearly proved. Sect. 45 of the Marine Insurance Act, 1906, which provides that an insurer is discharged from liability by a change of voyage deals with a change which is going to affect ship and assured, namely, a voluntary change of voyage. There is no authority as to the effect of an involuntary change of voyage. It has been decided in many cases that an involuntary deviation has no effect on a policy. It is suggested that the held covered clause only applies to a voluntary change of voyage, but such a construction would not be reasonable. Moreover, an involuntary change of voyage is covered by the policy without the help of the held covered clause. It was held in *Elton* v. *Brogden* (1) that if the sailors force the master of a ship to go out of the course of the voyage it is not a deviation and the insurers are not thereby discharged but are liable on the policy. The decision of the House of Lords in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (2) supports the proposition contended for. In the *Halle* case the held covered clause was in somewhat different terms from the held covered clause in the *Minden* case. The risks were different and the clause was framed in wider terms. In this case not merely change of voyage or deviation, but also "any additional risk" was to be held covered. All the arguments as to the time when the loss arose in the case of the *Minden* apply to this vessel. If it is necessary to rely on the held covered clause, the limitation put by Hilbery J. on that clause in the case of the *Minden* does not apply here. In the *Wangoni* case there

(1) (1747) 2 Str. 1264.

(2) [1916] 1 A. C. 650.

was a constructive total loss before there was any change in the voyage. The plaintiffs need not rely on the "held covered" clause. The premium paid covered the loss which happened.

Pilcher K.C. and *A. J. Hodgson* for the defendants. Hilbery J. was right. As soon as war broke out the contractual voyages became illegal, the contracts of affreightment were gone, and there was a frustration of the contractual voyages by restraints of princes or peoples within the meaning of the frustration clause so that the defendants were discharged from liability. There can be no question that the only claim which the plaintiffs can have in respect of events before the departure of the ships from the neutral ports is one for constructive total loss. Sect. 57 of the Marine Insurance Act, 1906, sets out the only conditions under which you can have an actual total loss and there was in this case a balance of probability so that it is impossible to contend that the goods were irretrievably lost to the assured. As to constructive total loss, the plaintiffs were deprived of the possession of their goods, and on the finding of Hilbery J. it was unlikely, within s. 60, sub-s. 2, of the Act that they would recover them, but where the insured goods are physically intact and undamaged a claim for a constructive total loss can only be based on the loss of, or frustration of, the adventure through perils insured against, namely, restraint of princes or peoples. It is the loss of the adventure which entitles the assured to recover because there is an insurance of the safe arrival of the goods, in other words, of the adventure. The assured cannot succeed except by proving the loss of the adventure: *Barker* v. *Blakes*, per Lord Ellenborough (1); *Sanday & Co.* v. *British and Foreign Marine Insurance Co.*, per Bailhache J., Lord Reading C. J. and Bray J. (2); *British and Foreign Marine Insurance Co.* v. *Sanday & Co.*, per Earl Loreburn, Lord Atkinson, and Lord Wrenbury. (3) In fact, the plaintiffs' claims were so based. The defendants are, therefore, protected by the frustration clause. Certainly no claim for constructive total loss would lie under the peril "enemies," because in fact the restraint of the German Government had commenced to operate some days before an enemy existed, and that restraint was continued. The position here is very much the same as in *Becker, Gray & Co.* v. *London Assurance Corporation.* (1) A successful claim can be made on no other ground than restraint of princes or peoples. Once it is appreciated that the loss claimed is due to restraint of princes or peoples it is only possible to formulate a claim for constructive total loss due to that restraint because the adventure is frustrated by reason of the restraint. If there is a loss by a peril insured against which is also a peril from which the policy is warranted free, the assured cannot recover. In none of the cases was there any deviation or change of voyage authorized by the policy. The voyages were abandoned when, in obedience to the orders of the German Government, the masters of the ships turned towards the neutral ports, and from that moment the defendants were discharged from liability under the policies.

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(1) (1808) 9 East 283, 293.

(2) [1915] 2 K. B. 781, 784, 809, 825.

(3) [1916] 1 A. C. 650, 656, 660-662, 673.

Cur. adv. vult.

1940. Nov. 25. The following judgments were read:

SCOTT L.J. The decision in all three appeals, which we heard together, turns on the same main point of law, and it will, therefore, be convenient to summarize the common position.

The claims are by British cargo owners against Lloyd's underwriters on voyage policies, said to be in what is called (but not proved to be) "standard form," with various clauses attached and incorporated in the policy. Each policy covers war risks, as well as marine risks, and each policy also contains the now common form of the so-called "frustration clause," which was invented to exempt underwriters of voyage policies from the kind of liability which was authoritatively established by the House of Lords' decision in *British and Foreign Marine Insurance Company, Limited* v. *Sanday & Co.* (2) In that case two British ships carrying goods under bills of lading with German destinations were, on the outbreak of war in

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(1) [1918] A. C. 101.

(2) [1916] 1 A. C. 650.

August, 1914, diverted in the English Channel, one by a French cruiser and the other by British orders, to British ports, where they delivered their cargoes intact to the insured British owners at those ports. The assured gave notice of abandonment and issued writs claiming for a constructive total loss. The House of Lords, affirming Bailhache J., and a majority of the Court of Appeal, held that, though the goods were intact, the adventure had been lost; that the "subject-"matter" of the policy was the safe arrival of the goods at the end of the voyage, that is, the adventure; that in English law the loss of the voyage entitled the assured on goods, after giving due notice of abandonment, to recover for a constructive total loss; and that the Marine Insurance Act, 1906, had not altered that well-recognized rule of law. The clause then first introduced into Lloyd's "standard" form of voyage policy is as follows: "Warranted free of any claim "based upon loss of, or frustration of, the insured voyage or "adventure caused by arrests restraints or detainments of "kings princes peoples usurpers or persons attempting to "usurp power." The defendant underwriters pleaded the clause as a bar to all three actions, and the learned judge held that it was a good defence.

We were informed that the outbreak of the present war had led to many insurance claims, and that the three cases before us had been selected by agreement between underwriters and the representatives of claimants as typical, and that the underwriters had agreed to pay all costs in any event up to and including the House of Lords. Naturally, the underwriters wanted to get as much legal enlightenment as they could. The pleadings, we were told, were with that object settled by opposing counsel in consultation. The material facts were all agreed, and, although no notices of abandonment were given, the underwriters agreed, in view of the late dates at which the assured obtained sufficient information to give such notices, to waive the absence of notice, and, accordingly, conceded that each of the three cases was to be argued on the assumption that due notice had been given at the proper time. The result was that many questions of law were argued below

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on both sides which were only contingently or even remotely relevant, including some which turned on obscure or possibly conflicting provisions contained in the congeries of attached clauses. Hilbery J. with reluctance dealt with several of these secondary contentions of both sides, although some of them were rendered irrelevant by his decision that the actions were defeated by the frustration clause, but, in the view which I take, namely, that that clause affords no defence in these actions, nearly the whole of those secondary issues cease to have any materiality at all.

Agreed statements of facts were before the Court below in each case, with one or two minor amendments, together with the waiver and admission by underwriters as to notice of abandonment which I have already mentioned. The dominant fact was that the German master of each German ship received from his own Government at least a fortnight before September 3, 1939, the day when war was declared, orders in furtherance of German war policy "to take refuge" with his ship "in a neutral port and, if possible, to return to Germany with "its cargo, or as a last resort to scuttle his vessel." These orders were duly carried out by each of the three masters. [His Lordship stated the facts, and continued :] From these facts the inference is, to my mind, irresistible. In each case the master was acting, as no doubt was his bounden duty in German law, in strict obedience to the orders he had received. The departure from the direct route of the bill of lading voyage was in each case made in order to take the British-owned cargo as well as the German-owned ship to a port of refuge. The stay in that port was in pursuance of the plan of the German Government. The departure from that port was equally the act of the German Government, through its agent, as was also, in the *Minden* and *Halle* cases, the act of scuttling, and, in the *Wangoni* case, the act of bringing the ship and cargo to Hamburg and there holding it to the order of the German Government. In each case when the ship was diverted from its normal contractual course towards a port of refuge the German Government through the master received actual possession of the British-owned

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goods and thereafter retained it. When, pursuant to those orders, the ship left the neutral port, if not before, that government was guilty, if I may apply a metaphor from English common law, of converting the goods to its own use. When that happened, if not before, the result was for the plaintiff cargo-owners under each policy a loss, not merely of the voyage or adventure, but of the goods themselves, and that loss was one to which there attached the requisite attributes of a constructive total loss as laid down in s. 60 of the Marine Insurance Act, 1906, provided always that the loss was proximately caused by a peril within the policy. If it was so caused it is one in respect of which the assured are, in my opinion, entitled to recover, wholly apart from any considerations of the loss of the voyage.

It only remains, therefore, to consider the list of perils, to see if that loss was covered. As the policies differ, each must be considered separately. In the case of the *Minden* the policy itself (that is apart from its attached clauses and the frustration clause in italics) was, so far as the black ink part of the printed form goes, in the same form as that in the Schedule to the Marine Insurance Act, 1906. It contained the word "enemies," and the general words. There had been in the printed and attached set of "Clauses for Shipment from "South America" (No. 17A) an f.c. and s. clause, but it was deleted. No. 1 of the printed Institute War Clauses, also attached, contained two sub-clauses, (*a*) and (*b*), which, I think, ought to have been struck out as superfluous in view of the absence from the policy itself of any f.c. and s. warranty and of its deletion from the South American clauses to which I have just referred. Both (*a*) and (*b*), however, were left in. I do not think that they have any effect at all, but it was argued alternatively for the appellants that the sub-clauses introduced perils not covered by the word "enemies," and that, if the facts did not disclose a loss by "enemies," the words in sub-clause (1) which purported to make the policy cover all the individual perils named in (*a*)—an inflated or extended f.c. and s. clause—entitled the appellants to recover. I do not think that is a legitimate construction of sub-clause (*a*)

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because the clause only purports to bring back into the policy perils already in the policy but excluded by the f.c. and s. warranty. Sub-clause (*b*) clearly adds nothing to the word "enemies" already in the "standard" form. Nothing else in the Institute War Clauses deserves even mention in the present context, and in the Institute Strike Clauses and in the typed clause there is nothing which has any relevance whatever. So far as concerns the question of insured perils, the policies in the other two cases are not less favourable to the assured than the *Minden* policy, for they are professedly on "all risks."

Mr. Pilcher's argument for the respondent underwriters was that all three claims were "based upon loss of the insured "voyage," and were, therefore, barred by the frustration clause. On being asked by the Court whether he meant that they were claims which (1.) were *capable* of being based on loss of voyage, or (2.) were *in fact* based on loss of voyage, or (3.) could *only* be based on loss of voyage, he at first said that he relied on (3.), or in the alternative on (1.), but on further reflection he submitted that (2.) was the true proposition. I am satisfied that contention (1.) is erroneous in law. If there is a constructive total loss of the goods themselves within s. 60 of the Marine Insurance Act, 1906, the mere fact that there is also a loss of the voyage cannot exclude the right of recovery for the former, and I know of no justification in any judicial opinion expressed in any case, whether as the ground of decision, or merely obiter, for such a contention. In my opinion, it is only where, on the facts, no claim can be put forward except for the loss of the adventure that the frustration clause has any application. In the present case no claim was put forward for loss of the adventure. The claim made, and rightly made, in respect of what I have called the conversion of the goods by the German Government was a claim for the loss of the goods themselves. There was, when each ship sailed from its port of refuge for Germany, in my opinion, at that moment such deprivation of the goods without likelihood of recovery as to constitute a constructive total loss within that section. Whether it amounted to an irretrievable deprivation so as to constitute an actual tota loss within s. 57 of the Marine Insurance Act, 1906, it is unnecessary to decide or even to consider.

An argument was addressed to Hilbery J., and to some extent to us, on behalf of the underwriters, that there is in the English law of marine insurance no such conception as a constructive total loss of the goods themselves, but that the "subject-matter" of every policy on goods is the adventure only, and that, in every case where a constructive total loss of goods happens, it is through the non-arrival of the goods at their destination, or in other words through loss of market. The cases of loss of adventure such as *Rodoconachi* v. *Elliott* (1), or *Miller* v. *Law Accident Insurance Co.* (2), or *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (3), to which we were referred, are all cases where the goods remained in the possession of the bailors through their bailees, the carriers, and the *only* loss suffered by the insured bailors was the loss of market or of voyage. No judge, so far as I know, has ever countenanced the proposition that in insurance on goods the *only* constructive total loss recognised in law, either before or since the Act, is loss of the adventure. In the case of certain perils enumerated in the ordinary Lloyd's policy, scheduled to the Act, it can hardly be doubted that a constructive total loss of the goods themselves may arise when they are taken wholly out of the possession of the assured and his bailee—for example, "pirates, rovers, thieves." If there can be an actual total loss in such cases through irretrievable deprivation under s. 57, I can see no reason why the law should not recognize a constructive total loss under s. 60, sub-s. 1, where the goods are reasonably abandoned on account of their actual loss appearing unavoidable, or under sub-s. 2 where it is unlikely that the assured can recover the goods or the cost of recovering them would exceed their value when recovered. For these reasons I think the argument that the only constructive total loss of goods known to the law is where the loss of the adventure takes place is untenable and that the appellants are entitled to succeed.

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(1) L. R. 9 C. P. 518.
(2) [1903] 1 K. B. 712.
(3) [1916] 1 A. C. 650.

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I have not drawn attention to the assumption, implicit in what I have already said, that the policy was in each case still in force at the moment when the ship left its neutral port of refuge. So far as I can gather, that assumption was hardly challenged below, or before us, but I ought perhaps to deal with the point. As the three policies differ in the relevant wording, I will discuss them separately. In the case of the *Minden*, r. 2 of the " Rules of Bill of Lading " gave the ship "liberty to call at any ports in or out of the customary "or advertised route in any rotation and for any purpose ". That clause, by its last words especially, I think, authorized the deviation to Rio. Clause 10 of the Clauses for Shipment from South America, attached to the policy, included bill of lading liberties, and clause 13 repeated the liberty adding "for all purposes whether necessary or otherwise." Clause 18 made clauses 10 and 12 paramount. Down to the outbreak of war on September 3, 1939, the deviation of the *Minden* was thus covered by both the bill of lading and the policy. In the case of the *Halle*, a " war clause " attached to the bill of lading provided that, in addition to other liberties, the carrier might "in the event of the imminence . . . . of war ". . . . between any nations " or "measures taken by any "governments in consequence of or connected with any "of the above matters "—and then the clause does not say in terms what the carrier might do, for it is not completed grammatically. The next sentence, however, says that "anything done by reason of or in compliance with these "clauses is within the contract voyage." The deviation towards Bissao is thus covered, but, as the ship did not reach Bissao till September 6, it is necessary to consider the position between September 3 and 6. As there was nothing after September 3 which the British cargo-owner could do to cause the master of the *Halle* to alter the course of his ship or prevent him going on to Bissao, I think that the ship must be regarded as still within the bill of lading liberty, and, as clause 2 of the Timber Trade Federation Insurance Clauses, 1938, attached to the policy, included all " bill of lading liberties," it follows that the policy was still in force and that the insurance position was thus the same as in the case of the *Minden*. In the *Wangoni* a clause attached to the bill of lading contained this provision: "If one of the following incidents or one of the "following measures occurs or threatens to occur, that is to "say, war between any peoples; civil war; prohibitions, "restrictions or control by any government of traffic, trade "or by any other means, with any country from which or to "which the ship normally sails; control or disposal by any "government or authority of the use or movement of the "ship (or) of insulated or other holds of the ship, the ship-"owner (or his representative) is entitled, if he considers "that the ship, her master, officers, crew, passengers or cargo "are subject, either wholly or in part, as a result of the incidents "or measures referred to above, to loss, damage, contravention "or detention, or to suffer delay, to alter the journey either "before or after its commencement, or to vary the anticipated, "agreed or usual voyage, or to detain the ship or to delay "the voyage." There was no general inclusion in the policy of bill of lading liberties, but they were "held covered at a "premium to be arranged." If the assured had to rely on that clause alone a suitable premium would have to be fixed for the extra risk (if any) of returning to Vigo. Except for this difference the *Wangoni* position is the same as the other two.

I have discussed the policy voyage in each case, but in truth I do not think that the appellants' rights of recovery depend on provisions as to deviation. Apart from deviation liberties, at the start of the deviations the cargoes were, under the orders of the German Government, merely under restraint of princes and the deprivation was merely contingent, but, if those orders compelled the masters, at any time, finally to abandon the commercial voyages, it is I think a necessary inference from the facts that the German Government then ipso facto took absolute and not conditional possession of the goods, and thereafter deprived the appellants of their possession continuously until, in the two cases, they went to the bottom, and in the third, the cargo reached the hands of the German Government in Hamburg. If on September 3 the assured had given notice of abandonment there would

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then have been a constructive total loss of the goods and we are to decide the appeals as if that had been done. On the other issues discussed here or below as alternative contentions raised by one side or the other I say nothing as they are rendered immaterial by the above decisions.

It follows that in all three cases the appellants are entitled to recover, and that all three appeals must be allowed and judgment entered in each action for the appropriate sum of money. In view of the respondents' agreement to pay all costs there will be no order except for taxation of all the appellants' costs here and below. Leave to appeal to the House of Lords.

MacKinnon L.J. I have written a separate judgment in each of these cases. As to the *Minden*, this is a claim to recover an alleged loss under a policy of marine insurance. All actions normally involve questions of fact, and questions as to the law applicable to those facts. In this case there is no dispute as to the facts. Very sensibly they have been set out in an agreed statement. As to the law the only questions involved are as to the proper construction of the contract sued on. There are two massive volumes of Arnould which purport to deal with The Law of Marine Insurance. They now contain over 1800 pages, and the Marine Insurance Act, 1906, is entitled " An Act to codify the Law relating to "Marine Insurance." The truth is that this law of marine insurance is nothing more than a collection of rules for the construction of the ancient form of policy and such additions as are from time to time annexed to it. The ancient form dates back at least to the sixteenth century, and it is a document which the late Sir Frederick Pollock characterized, with justifiable asperity, as " clumsy, imperfect, and obscure." Many of the imperfections and obscurities had to be resolved by Lord Mansfield, with the assistance of his famous special jurymen. A striking example of his task in that respect is *Lewis* v. *Rucker*. (1) The question arose of the proper method of assessing a particular average loss of goods. The obvious thing would be to see what the contract of the parties provided, but it provided nothing whatever. The assured put forward one method of assessment; the underwriters put forward another. Lord Mansfield decided for the latter, saying: "The special jury, amongst whom there were many knowing "and considerable merchants, found the defendant's rule "of estimation to be right, and gave their verdict for him. "They understood the question very well, and knew more "of the subject of it than anybody else present." The rule so settled is now embodied in s. 71 of the Marine Insurance Act, 1906. But, in truth, it is an implied term in the old form of policy, added to its imperfect expression by the practice of assured and underwriters as found by the knowing and considerable merchants in 1761.

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(1) (1761) 2 Burr. 1167.

Innumerable clauses have from time to time been devised to supplement the ancient form. Unhappily tradition seems to have caused them also in very many cases to be "clumsy, "imperfect, and obscure," and the fact that Arnould's work now covers 1800 pages is largely the result of that tradition. Oddly enough, the tradition has even infected the Legislature with a microbe of inaccuracy. In 1746 an Act (19 Geo. 2, c. 37) was passed which made re-insurance illegal, except in the case where "the assurer shall be insolvent, become a bankrupt, or "die." It is inconceivable that an insolvent underwriter should desire to re-insure, and obviously the evil aimed at was double insurance by the assured. "Re-insurance," however, had then its present well known meaning, and the draftsman of the Act used the wrong word in order to maintain the tradition of obscurity.

I hope this irrelevant exordium is venial. I only wish to emphasize that, when the facts in this case are agreed, the sole question is whether, on the true construction of their contract, the assured can claim to be paid a certain sum by the underwriter.

The material terms of the policy in the present case are these. The insured perils include: "men of war . . . . "enemies . . . . surprisals, takings at sea, arrests, restraints "and detainments of all kings, princes and people . . . .

"and of all other perils, losses and misfortunes that have "or shall come to the hurt, detriment or damage of the said "goods and merchandises . . . ." This list of perils in the ancient form is possibly enlarged by the first of the Institute War Clauses, which says, "This policy covers . . . . loss of "or damage to the property hereby insured caused by :—(1.) "hostilities warlike operations . . . . (2.) mines torpedoes "bombs or other engines of war." Lastly, there is the clause on which most of the argument before us has turned: "Warranted free of any claim based upon loss of, or frustration "of, the insured voyage or adventure caused by arrests "restraints or detainments of kings princes peoples usurpers "or persons attempting to usurp power." Counsel have called this "the frustration clause," and I will use that name to refer to it hereafter.

As a matter of the construction of this contract my conclusion, on the agreed facts, is as follows. If the goods were still covered by the policy, there was a constructive total loss when the German captain at Rio determined to obey the instructions of his government, hold the goods as the subject and servant of that government (thereby ceasing to hold them as the bailee of the assured), carry them if he could to a German port, or sink them by scuttling his ship if intercepted by a British or French vessel. It is possible that the moment of that constructive total loss was not when the master determined in his mind so to obey and act, but when he acted on such determination by weighing anchor at Rio to sail, if he could, to Germany. But this is an immaterial distinction. Hilbery J. seems to agree with me in this conclusion. For in his judgment he says: "When, however, he "[the captain] actually sailed for Germany, we have an overt "act from which we can draw certain inferences. In thus "acting he was restraining or detaining the plaintiffs' goods. "He was taking them and holding them under and to the orders "of the German government. The orders of the German "government and his acts done thereunder were in the "circumstances a restraint of princes or people." I think this is right. The result would seem to be that, if the policy was still in force, there should be a right of the assured to claim for a constructive total loss. But the learned judge decided in favour of the defendants, and he did so because of his view as to the effect of the frustration clause. That view, I think, is erroneous.

The frustration clause is obviously designed to counteract the effect of *British and Foreign Marine Insurance Co., Ld.* v. *Sanday & Co.* (1), in which case the insured goods were safely in the possession of the assured, but they were held entitled to recover for a constructive total loss because the insured voyage had been put an end to by an insured peril. The clause frees the underwriters from "any claim based upon loss "of, or frustration of, the insured voyage." The assured in the present case makes no claim based on such a loss. He makes a simple claim for the loss of his goods by his being deprived of them. The truth is that the argument for the defendant requires to read the clause as meaning: "free of "any claim which on the facts might be based on loss of the "insured voyage." But I am satisfied that its proper meaning must be: "free of any claim which is in fact based, and can "only be based, upon loss of the insured voyage." Hilbery J., however, has held that the claim is barred by this clause. He does so acting on the idea that, to establish any claim on a policy on goods, the assured must always allege a loss of the insured voyage as well as loss of, or damage to, the goods. Elementary considerations, I think, must demonstrate the error of that idea. If, on an ordinary policy on goods, without any added clause, the goods arrive at their insured destination, but on the voyage have been damaged by sea perils so that their damaged arrived value is half the sound value of like goods, the assured obviously has a claim for half the insured value. But Hilbery J. would apparently give him nothing, because the goods have all arrived and he cannot assert any loss of the insured voyage! The radical error appears in Hilbery J.'s judgment when he says: "The policy being a "marine insurance policy, the subject-matter of the insurance "is the adventure of the goods on the voyage. The goods

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(1) [1916] 1 A. C. 650.

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"are not insured apart from the voyage. It is the voyaging "of the goods upon the voyage which is the subject-matter "of the contract." The subject-matter of the contract is, of course, the goods, and they are insured against loss or damage by insured perils. But, even if the goods are not so lost or damaged, there is an *additional* insurance against the loss of their voyage. The learned judge considers this to be not an *additional* risk, but an essential part of it in every case, whereas the two quotations from Bray J. and Lord Reading C.J. [in *Sanday & Co.* v. *British and Foreign Marine Insurance Co., Ld.*] which he cites just afterwards, both make it clear that this is only an additional risk. Bray J. said (1): "It is not true that in a policy of this kind the goods only are "insured. Their safe transportation to and arrival at the port "of destination is also insured," and Lord Reading used almost identical words. (2)

I think it is unnecessary to discuss further this misconception as to the nature of a policy on goods. I would only add that, if Hilbery J.'s view were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, on the judge's reasoning, would in every case of such deprivation that I can imagine make that promise absolutely nugatory!

I said earlier that there was a constructive total loss of the goods at Rio, if the policy was still effective. If the insured voyage were simply from the River Plate to Shanghai or Hong Kong, via Durban, there would have been a deviation when the master turned back from his easterly course to make for Santos, and there would have been a change of voyage when he weighed anchor to go from Rio to Germany or as near thereto as he could safely get. There is under this policy no question of either this deviation or change of voyage discharging the underwriter (under s. 46 or s. 45 of the Marine Insurance Act, 1906) from liability, for the attached clauses twice over provide that the assured shall be held covered in

(1) [1915] 2 K. B. 781, 832.

(2) Ibid. 809.

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case of deviation or change of voyage at a premium to be arranged. The only question, therefore, is whether the defendant is entitled, on his counterclaim, to an extra premium for either the deviation, or the change of voyage, or for both.

Deviation is a departure from that via which is expressly or impliedly specified or permitted by the policy. The via specified in this policy is (*a*) at and from any place in South America to Hong Kong or Shanghai, direct or indirect, and (*b*) including all liberties as per contract of affreightment. Seeing that the latter words (in the "Clauses for Shipment from "South America") permit a variation of the specified voyage, pursuant to liberties in the contract of affreightment, without any extra premium, they appear to conflict with, but must override, the clause in the Institute War Clauses which provides: "Held covered at a premium to be arranged in case "of deviation . . . . by reason of the exercise of any liberty "granted to the ship-owner . . . . under the contract of "affreightment." The lengthy war clause attached to the bill of lading, I think, clearly gave the ship-owner liberty to go to Santos. On this state of the contract in the policy I think the going to Santos was a permitted deviation, and therefore, excused under s. 49, sub-s. 1 (*a*), of the Act. But, quite apart from that, I think it is also excused under s. 49, sub-s. 1 (*b*), as being "caused by circumstances beyond the "control of the master," that is by the orders of his own government. In the result, I think that no extra premium can be claimed for the deviation.

Change of voyage is defined in s. 45, sub-s. 1. This no doubt reproduces the effect of decided cases. I asked counsel if they knew of any case which answered the question: "Whose "is the voluntas referred to in the words 'voluntarily "'changed?' Is it that of the assured or of the captain?" They knew of none. I do not think I need pursue the inquiry, for, whether the words refer to the assured or the captain, leaving Rio for Germany was not a voluntary change from the voyage to Shanghai. It was one made under compulsion. Therefore, I think that no extra premium is due for change of voyage.

Lastly, I said that this was a constructive total loss.

Normally, there can only be a claim for that type of loss if notice of abandonment has been given. The defendant does not seek to rely on the absence of such notice, and, manifestly, he could not, for it is agreed that the assured knew nothing of the fate of their goods until after the vessel was scuttled off the Faroe Islands. Therefore, pursuant to s. 62, sub-ss. 3 and 7, of the Act, the lack of notice would be excused, even if s. 62, sub-s. 8, did not apply.

In the result, I think that this appeal succeeds, and that judgment should be entered for the plaintiffs for 197*l.* 1*s.* 3*d.* with interest from the date of the writ. I understand that there is an agreement between the parties as to costs, and no order about them is desired.

In the case of the *Wangoni*, Hilbery J. decided in favour of the defendant on his view of the effect of the frustration clause. For the reasons I gave in the *Minden* case I think he was wrong. That which I ventured to call the radical misconception as to the nature of a policy on goods seems to be even more disastrously asserted in this case in the following passage in the judgment: "For the reasons I gave in the case of the "*Minden*, the adventure, the subject-matter of the insurance, "being frustrated when the master sailed from Vigo, the "subject-matter of the policy was gone and the underwriters "were no longer at risk . . . ." If this were correct, it becomes even more manifest that when the assured paid his premium he was receiving in return a policy which in no event could be worth more than the paper on which it was written. If the goods arrived at the insured destination damaged on the way by insured perils he could recover nothing, since he could not assert any loss of "the adventure, the subject-"matter of the insurance." If they were lost on the voyage by reason of insured perils he could recover nothing by reason of the operation of the frustration clause! In no conceivable event could he ever recover a penny. The construction of a commercial contract leading to such a result seems unlikely to be correct, except in a community consisting of fools and knaves.

The principles which I discussed in the *Minden* case seem to me to apply equally in this case and to have the same

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result. There is, however, one factor in this case which does not arise in the *Minden* case, or in the remaining *Halle* case. That arises from the communications sent by the shipowners, through neutral agents, offering the release of the goods on certain suggested terms. It was argued that, having regard to those communications, the assured could not assert a constructive total loss. He could assert that he was for the time being "deprived of the possession of his . . . . goods by "a peril insured against," but he could not further establish that it was unlikely that he could recover the goods or that the cost of recovering the goods would exceed their value when recovered within the provisions of s. 60, sub-s. 2 (i.) of the Act. One factor in estimating the chances of such recovery, or its expense, is, I think, not to be disregarded. The assured wrote their letter of October 11, 1939, to the insurance brokers, and the brokers showed it to the underwriters. The policy, of course, contained the waiver clause: "And it is especially "agreed that no acts of the insurer . . . . in recovering the "property insured . . . . shall be considered as . . . . an "acceptance of abandonment." The underwriters, I cannot doubt, with all the organization of the corporation of Lloyd's and its agents at their command, must have been at least as much able to recover the goods, if that was commercially practicable, as Middows, Ld., if not more able. It is not without significance that on being shown the letter of October 11 the underwriters merely indorsed on it: "Act as if "uninsured." This fact is not included in the agreed statement, but was told us by counsel. I do not think it is necessary to examine the facts and correspondence in detail. The conclusion I come to is that it was at all material times certain that the cost of recovering these goods (of which the insured value was only 24*l.*) would exceed their value when recovered. In the result, I think that the plaintiffs were entitled to claim for a constructive total loss.

As to notice of abandonment the defendant takes no point. Probably the communication to the underwriters of the letter of October 11 would suffice as such notice, under s. 62, sub-s. 2, of the Act. As to extra premium for deviation or change of voyage, what I said in the *Minden* case is sufficient. In the result, I think that this appeal should be allowed, and judgment entered for the plaintiffs for 6*s*. 8*d*. with interest from the date of the writ.

In the case of the *Halle*, the facts are very similar to those in the case about the *Minden*, though, of course, the ports and places are different. The policy is not in precisely the same terms, but I do not think there is any part of it which raises different considerations. The frustration clause is identical. Hilbery J. was of opinion that there was a constructive total loss when the master of the *Halle* sailed from Bissao. I agree with him, but he has gone on to hold that the claim for that loss is barred by the frustration clause for the reasons expounded by him in the *Minden* case. In my judgments in that case and in the *Wangoni* case I have explained why I cannot agree with this part of his judgment. The absence of notice of abandonment was not relied on by the defendant. As to extra premium for deviation or change of voyage, I think that what I said in the *Minden* case applies here also. In the result, I think that this appeal should also be allowed and judgment entered for the plaintiffs for 3*l*. 7*s*. 9*d*., with interest from the date of the writ.

LUXMOORE L.J. I have had the opportunity of reading and considering the judgments which have just been read by my brethren and I find myself in complete agreement with the conclusions at which they have arrived and with the reasons for those decisions. In the circumstances I do not think that any useful purpose would be served by my delivering a separate judgment. I, therefore, content myself with saying that I agree that the three appeals should be allowed for the reasons stated by my brethren.

Appeals allowed.

Solicitors for plaintiffs: *Slaughter & May; W. A. Crump & Son.*

Solicitors for defendants: *Ince, Roscoe, Wilson & Glover.*

G. F. L. B.

FRANKLIN *v.* BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED.

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Oct. 17, 18.

Negligence—"Black-out" conditions—Duty of persons on roads—Failure to look out—Contributory negligence.

In the "black-out" conditions existing during the war there is imposed on persons on a road a new duty of bearing in mind the difficulty which drivers of oncoming vehicles must have of seeing them, and the duty of realizing that they must take all reasonable steps to minimize this difficulty.

Therefore, where a person on a road during such conditions failed to get off the road or to look round to see what was coming, and was knocked down and killed by an omnibus:—

Held, that he was guilty of contributory negligence.

Appeal from the judgment of Hawke J.

The plaintiff, a widow, claimed damages for the death of her husband ("the deceased"). The latter, during the "black-out" in September, 1939, was walking on the high road near Swindon, the night being very dark. He was wheeling a bicycle on the off side of the road, and was crossing to his near side; his machine did not carry a red rear light as it should have done by statutory regulation, but he carried a reflector disc and his mudguard was painted white. A Swindon Corporation omnibus came along the road behind him; the driver saw him at the last moment, and, by making a violent swerve to his off side, just avoided him. Another omnibus, belonging to the defendants was following the first omnibus at a considerable distance; the driver did not see the deceased, ran into and killed him. This omnibus carried two side lights, placed high up and not low enough to throw much light on the roadway. After escaping the first omnibus the deceased failed to look round to see if anything was coming, and remained in the roadway.

Hawke J. held that the deceased had been guilty of contributory negligence, and gave judgment for the defendants.

The plaintiff appealed. The appeal was heard on October 17, 18, 1940.

F. S. Laskey for the appellant.

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Humfrey Edmunds for the respondents.

SCOTT L.J. [having stated the facts, continued :] In those circumstances Hawke J. held that the deceased had been guilty of contributory negligence, and that, therefore, his widow could not recover. The appeal was brought to this Court mainly on the ground that the learned judge had found that the omnibus was following close behind the first omnibus, whereas the evidence showed that there was a very considerable distance between the two. It was argued, I think successfully, that the case had to be considered apart from the movements of the first omnibus, as if only the man in the road with his bicycle was relevant to the collision ; for it was said if there was such a distance, there was ample opportunity for the driver of the second omnibus to see the man and his bicycle in time to avoid a collision, just as the first omnibus had succeeded in doing, and that driver's negligence was the sole cause of the collision.

Prima facie any such difference in the inference of fact drawn by this Court from that drawn by Hawke J. was important ; but counsel for the respondents suggested a ground for holding his judgment, which was not raised before Hawke J., and submitted that as respondent he was entitled to rely upon that ground in this Court. He contended that in the black-out during the war, and under the stringent conditions limiting lights, the position of a pedestrian in the road is quite different—particularly if he is wheeling a bicycle, and quite apart from the regulation compelling the carrying on the bicycle of a red rear light—from what it is in times of peace, when motors have full head lights and when the conditions of difficulty caused by the black-out do not exist. In black-out conditions there is imposed on a person in a road the new duty of bearing in mind the difficulty which the driver of an oncoming vehicle must have in seeing a person or a vehicle bearing no light, and of realizing that, as a person in the road, he must take all reasonable steps to minimize such difficulty. That broad argument appears to me to be well-founded and reasonable, and if, through the absence of

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some antecedent precaution, or through his failure to take some step which he could take, the pedestrian increases the difficulty of the driver of the oncoming vehicle, in my view it cannot be said that that breach of duty or failure to take reasonable care does not contribute causally to the accident.

In this case I think undoubtedly that the defendants were to blame, on the ground, first, that the sidelights were so high that they did not serve to illumine the road and were not supplemented by the masked headlight which was permissible, and made it wrong to have the side lights placed so high on the vehicle; and, secondly, that even in those difficult circumstances, the driver did not keep as good a look-out as he might have done. However, even assuming that negligence, it does seem to me that, in the circumstances, it is impossible to exonerate the deceased man from want of care, after he had nearly been run into by the first omnibus, in failing to look round and see what was coming after he reached his proper side of the road. Moreover, if, through failure to look round, he omitted to step off the road, as he would obviously have been entitled to do, and so avoid the accident, and remained on the road in a position of critical danger, it cannot be said that he did not contribute to the accident. Therefore, I conclude that, apart from the question of a breach of statutory duty, he was guilty of common law contributory negligence which causally contributed to the accident. The case is obviously made stronger by the fact that he had not yet equipped his bicycle with a rear light.

For these reasons, in my view, the appeal must be dismissed.

MacKinnon L.J. I agree.

Luxmoore L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Lemon, Humphreys & Parker, Swindon.*

Solicitors for respondents: *Stanley & Co.*

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Nov. 20, 22, 25.

McMILLAN *v.* GUEST (H.M. INSPECTOR OF TAXES).

Revenue—Income tax—Director of English company—Director resident abroad—No duties of directors performed in England—Voluntary work for the company abroad—Salary as director—Salary chargeable to income tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E ; Rules applicable to Sch. E, rr.* 6, 18.

Although the director of an English company with its seat of government in this country resides abroad, his office is a public office situated within the United Kingdom and he is liable to be charged to income tax in respect of the profits of his office under Sch. E to the Income Tax Act, 1918.

The fact that a director is not performing the duties or exercising the rights attached to the office of a director by the general law or the articles of his company does not sever the tie of his office with this country ; and it makes no difference that he is voluntarily performing duties abroad for the company and is excused from attending board meetings in this country.

Proctor v. *Ryall* (1928) 14 Tax Cas. 204 considered and explained.

APPEAL from the decision of Lawrence J. on a case stated by the Commissioners for the General Purposes of the Income Tax for the division of St. Margaret and St. John.

At a meeting of the Commissioners on February 22, 1939, James Gellatly McMillan (hereinafter called "the respondent") appealed against the following assessments made upon him under Schedule E of the Income Tax Act, 1918, in the sums of 13,457*l.* for the years 1937–38 and 13,831*l.* for the year 1938–39 in respect of his office as a director of a company called A. Wander, Ld.

The following were the agreed facts :—

1. In 1910 the respondent joined A. Wander, Ld. (hereinafter called "the old company"), which was the predecessor of the present company of the same name. The business of the old company was the manufacture and sale of food preparations. In 1914 the respondent was made a managing director of the old company, and in 1918 or 1919 Sir Harry Hague was made a joint managing director of the old company.

2. Some time prior to 1919 a company (hereinafter called the Chicago company) had been incorporated in Chicago for the sale in America of food preparations similar to those sold

by the old company, and in the year 1919 the respondent was asked by his co-directors of the old company to go to Chicago to supervise and reorganize the business of the Chicago company and to become its general manager. The respondent left for Chicago in 1919, and since then he has continued to receive remuneration from the Chicago company for his services as general manager. In 1922 he ceased to be a joint managing director of the old company, but he remained a director thereof.

3. Since 1919 the respondent has been resident and ordinarily resident in America, and in 1938 he became a naturalized American citizen.

4. In 1923 the old company was reconstructed. It sold the whole of its assets and undertaking to the new company, which was incorporated on January 6, 1923. Pursuant to the reconstruction the old company went into liquidation. The new company holds a minority interest in the shares of the Chicago company. The new company is resident and controlled in the United Kingdom.

5. The respondent was appointed a director of the new company by the articles of association and has no contract of service with the new company.

6. Art. 90 of the new company's articles of association provides that the remuneration of the directors, other than the managing director, shall be a sum equal to 15 per cent. of the net profits of the company in every year (after making a deduction from such net profits of a sum equal to 2½ per cent. on the paid up capital of the company), and such remuneration is divisible among the directors as they may agree or in default of agreement equally.

7. Whilst art. 90 has not been altered, the directors of the new company agreed in 1927 that the 15 per cent. should be reduced to 10 per cent. as from January 1, 1926.

8. Under the foregoing arrangements the respondent, as a director of the new company, received tax free remuneration during the years 1936–37 and 1937–38 in the respective sums of 10,127*l.* and 10,467*l.* The assessments for 1937–38 and 1938–39 under appeal have been made in the respective sums

of 13,457*l*. and 13,831*l*., the basis of such assessments being the amounts received by the respondent (plus the income tax payable by the company on his behalf) in the year preceding the year of assessment.

9. The services which the respondent renders to the new company are set out in a statement annexed to the case.

The following are the material parts of this statement: In 1919 Mr. McMillan was instrumental in opening up a Canadian office of the old company, and was concerned in the administrative and selling organization of the branch business. In 1930 a factory was built in Canada for the new company largely on his advice. He superintended its building, and has since advised the manager of the Canadian branch. Mr. McMillan had also rendered valuable service to the new company by taking an interest in the employment of a suitable staff in the Canadian branch business.

Copies of all minutes, annual balance sheets and managing directors' and auditors' reports of the new company were sent regularly to the respondent in America. Otherwise the respondent takes no part in England in the management of the new company, and exercises no function in England as a director of the new company. He has attended no board meetings in this country except once in 1931 when he was in England on holiday, and another held in 1925 in Chicago. The new company does not require the respondent to attend board meetings and notices of board meetings are not sent to him.

Counsel on behalf of the respondent contended that in the foregoing circumstances the respondent did not hold or exercise an office of profit within the United Kingdom within the meaning of Schedule E to the Income Tax Act, 1918.

It was contended on behalf of the Crown:

1. That a directorship of an English company was an office of such a nature that there were duties attached to it by statute from which no person could escape by means of a private arrangement with the company and referred to ss. 37, 112 and 122 of the Companies Act, 1929.

2. That if a director lives abroad and everything to be done by him with regard to the company's management can be

done abroad, that does not relieve him of his duties in respect of the company under the Companies Act. For that reason the office of such a director is an office of profit which is held within the United Kingdom.

3. That the respondent holds a directorship in an English company which is an office of profit within the United Kingdom. The Commissioners decided that as the respondent retained the right and duty to exercise the power of a director he was therefore liable to assessment under Schedule E.

On appeal Lawrence J. reversed the decision, holding that the respondent was not exercising his office of director within the United Kingdom and therefore that he was not chargeable to income tax under Schedule E in respect of the sums in question. The Crown appealed. The appeal was heard on November 20, 22 and 25, 1940.

R. P. Hills (*Sir Donald Somervell A.-G.* with him) for the Crown. The respondent is chargeable to income tax in respect of his salary as a director of an English company under Schedule E to the Income Tax Act, 1918. The fact that the only acts done for the company are done outside the United Kingdom is immaterial.

The principles applicable in such cases are: (1.) If the source of income is in the United Kingdom tax is charged notwithstanding the non-residence here of the taxpayer. It is only if the source of payment and the person are both outside the United Kingdom that no tax is payable. If the taxpayer is in the United Kingdom and the source outside tax is still chargeable. Therefore the fact that the respondent is resident outside the United Kingdom is immaterial. (2.) The locality of the employer or paymaster and not the place where the employee works is the decisive feature in deciding the locality of that employment. That was decided in cases arising under Schedule D in *Pickles* v. *Foulsham* (1) and *Bennett* v. *Marshall* (2) but the same principle applies to cases under Schedule E. So far the position has been regarded as if the respondent here did all his work abroad, but in point of fact he held the position of director of an English company and as such had the duties and liabilities of that position. He cannot escape the obligations imposed on a director by the Companies Acts. He remains liable for the actions of the company in England and he cannot escape the obligation to see that dividends are properly paid. Even though his fellow directors allow him to continue a director without carrying out any active functions of a director, he still remains liable to perform them under the statutes. It is not as if there had been a delegation of his powers under art. 108 of the company's articles of association.

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(1) [1925] A. C. 458; 9 Tax Cas. 261.

(2) [1938] 1 K. B. 591; 22 Tax Cas. 73.

The tax under Schedule E is charged "in respect of every "public office or employment of profit." Rule 6 of the rules applicable to Schedule E imposes the limitation that the tax is to be paid in respect of public offices within the United Kingdom or by certain specified offices and these include "(*h*) offices or employments of profit under any company or "society." Reliance was placed by the other side on r. 18, sub-r. 2, which provides that "a person chargeable in respect "of an office or employment of profit shall be deemed to "exercise it at the head office of the department under which "it is held." This special provision for persons such as those holding positions under Government departments is said to show that in other cases where the work of the office is performed abroad no tax is payable. The answer is that r. 18 is a mere matter of machinery to facilitate the collection of the tax. There has never been any doubt that the director of a company holds a public office.

Pickles v. *Foulsham* (1) shows that it is not where the duties of an office are performed but the locality of the source of payment that is the test whether tax is chargeable; and though that case was decided under Schedule D it ought to be applied here; see also *Bennett* v. *Marshall* (2).

[Sir Wilfrid Greene M.R. I am not satisfied that those cases help the Court in the present case. Under Schedule E the source of the income is the employment and the question is to what employments the Schedule applies.]

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(1) [1925] A. C. 458.

(2) [1938] 1 K. B. 591.

That is not ascertained by regard to where the duties of the office are performed. The tax is payable under r. 1 by "every "person having or exercising an office or employment of profit." Whether the office is within the United Kingdom depends solely on the locality of the paymaster. Too much regard ought not to be had to *Pickles* v. *Foster* (1) in view of later decisions. *Barson* v. *Airey* (2) really assists the Crown here.

[He also referred to *Proctor* v. *Ryall* (3).]

J. M. Tucker K.C. and *Terence Donovan* for the respondent. Under Schedule D a non-resident in the United Kingdom is only liable to tax if he exercises his employment in the United Kingdom. It would be remarkable if the position was different under Schedule E and the special provision in r. 18, sub-r. 2, of the rules applicable to Schedule E lends support to the view that except in cases to which that special provision applies a person exercising the duties of his office abroad is not liable to tax.

The test is not where the employer resides. Every person holding an office does not necessarily do so at the place where his employer resides. This company is resident in this country but this director, having to perform his duties abroad, cannot attend board meetings. If a member of the board of a foreign company were working in this country, it would be hard to say that he was not exercising an office here. The place of exercise of the office is decisive, that is, where the functions of the office are in fact performed. The fact that a directorship is a creation of English law and that a director has obligations under English law does not determine the location of the office. Further the director of a company does not hold a "public office" within Schedule E. [They referred to *Barson* v. *Airey* (2); *Proctor* v. *Ryall* (3); *Corry* v. *Robinson* (4); and *Pickles* v. *Foster* (1).] The material fact here is that the respondent is only doing work in America.

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(1) [1913] 1 K. B. 174; 6 Tax Cas. 131.

(2) (1925) 10 Tax Cas. 609.

(3) (1928) 14 Tax Cas. 204.

(4) [1934] 1 K. B. 240; 18 Tax Cas. 411.

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[SIR WILFRID GREENE M.R. What he is doing there is done voluntarily.]

It is submitted not. As regard the test to be applied r. 18 of the rules applicable to Schedule E supports the respondent's case. If the ordinary rule was not that the place where the duty was exercised r. 18, sub-r. 2, would have been unnecessary.

No reply was called for.

SIR WILFRID GREENE M.R. This is an appeal from a judgment of Lawrence J., who reversed the decision of the General Commissioners for the Division of St. Margaret and St. John in the County of Middlesex.

The respondent has for many years been a director of a company called A. Wander, Ld., and was a director of the predecessor of that company, which was reconstructed in the year 1923. The company is a company incorporated under the Companies Acts. Its directorship and the whole of its government is in this country. The respondent appealed to the General Commissioners against assessments made upon him under Schedule E of the Income Tax Act, 1918, for the years 1937/38 and 1938/39 in respect of his office as a director of the company.

It appears that for many years the respondent has, in fact, resided in the United States of America, where he performed tasks on behalf of the old company and also for the new company since its formation. During the years of assessment he was in the United States performing those tasks, which consisted of generally furthering the interests of the company in the Continent of North America and the interests of a subsidiary company in which it was interested in the United States, of which he was, I think, the managing director. During the period in question covered by these assessments, he did not, in fact, take any part in the direction of the company in England. He resided the whole time in North America, where he performed the tasks to which I have referred. He attended no board meetings in England and, speaking quite generally, he took no part at all in the direction of the company in England.

The remuneration of the directors of the company is provided

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for by the articles, but the original arrangements with regard to remuneration, contained in art. 90, have been modified by an agreement between the company and its directors (including the present respondent) dated July 12, 1927. The articles had provided that the remuneration of the directors other than the managing directors should be an amount equal to 15 per cent. of the net profits in every year ascertained in the manner indicated. By this agreement the divisible remuneration for the directors was reduced to 10 per cent. of the profits.

It is to be observed that the remuneration payable to the respondent under the articles, as modified by this agreement, is paid to him as a director without any reference to particular tasks which he may be performing in the Continent of North America. The tasks which he is there performing are tasks which he does not perform under any obligation so to do. He could refuse to perform them; he could return to this country tomorrow; he could during the period of assessment have taken the part which he was entitled to take in the direction of this company in England; he had the right to attend the board meetings in England if he had been so disposed and the work that he was doing in the Continent of North America was something entirely outside his duties as a director; he was under no contract to perform those tasks and he received no remuneration for doing so.

It was suggested in argument that he could be regarded as having had delegated to him, under art. 108, the powers of the Board. That article in common form provides that: "The Directors may delegate any of their powers to committees "consisting of such member of their body as they think fit." No such delegation was, in fact, made, so far as appears from the stated case, beyond which, of course, we are not entitled to go with regard to matters of fact.

The position, therefore, to sum it up, during the relevant period, was this: the respondent was a director of an English company which had its seat of government in England. During the period in question he had all the rights of a director. He was subject also to all the liabilities of a director. His duties as director (by which I mean the duties which fall upon him by the general law and the particular articles of this company) were, so to speak, in abeyance for the reason that his fellow directors had dispensed with his services in England, because, no doubt, they thought that he would do better work by remaining in the United States. Nevertheless, all his rights and all his duties as director, if they had been, in fact, exercised, would have been exercised in this country and nowhere else, a circumstance which, to my mind, is not affected by the fact that during this period he has been doing other work for the company voluntarily at the request of his fellow directors and without payment. If the position of this gentleman with regard to the company which I have stated is borne in mind, I cannot myself find any real difficulty in construing the language of Schedule E as applied to those facts. It was held by the General Commissioners that the respondent during the years in question was liable to assessment under Schedule E. That decision, of course, implies that, in their view, the respondent had or exercised a public office or employment of profit within the United Kingdom. That decision was reversed by Lawrence J., and this appeal results.

Schedule E provides that tax under the Schedule, "shall "be charged in respect of every public office or employment "of profit." I need not read the other words, because they are not applicable to the present case. The necessity of the office having a public character appears in the Schedule itself and, of course, governs the remaining relevant provisions. Then under r. 1, tax under the Schedule is to be charged "on every "person having or exercising an office or employment of "profit mentioned in this Schedule"; and the list of public offices and employments of profit is to be found in r. 6. It is there for the first time that the reference to locality appears. Rule 6 provides that: "The tax shall be paid in respect of all "the public offices and employments of profit within the "United Kingdom or by the officers hereinafter respectively "described, namely"—then the relevant head is letter (*h*): "offices or employments of profit under any company or "society, whether corporate or not corporate."

I pause there to deal with one argument that was put forward by Mr. Tucker on behalf of the respondent, namely, that the holder of the office of director in a company incorporated under the Companies Acts does not hold a public office under a company within the meaning of that paragraph. He asked what the element of publicity was and how it should be defined in order to come within the language of the paragraph. It is, in my opinion, too late in the day to hold that the holder of the office of director in a company incorporated under the Companies Acts is not the holder of a public office within the meaning of the rule. No doubt, when the original Income Tax Acts were passed, the phrase "any company or society, "whether corporate or not corporate" embraced a very limited number of companies or societies. At that time the great expansion of joint stock enterprise had not begun. Nevertheless, such companies as did exist, I venture to think, were unquestionably regarded as companies the holding of office in which was the holding of a public office. As time has gone on, the nature of companies incorporated under the Companies Acts has changed, and now under the same Acts are incorporated companies of great importance, whose operations are a matter of public interest, as well as the most trivial companies which concern nobody but those directly interested in them: but I am myself quite unable to think of any division of companies incorporated under the Companies Acts which would confine the phraseology of this rule in the way that Mr. Tucker would have it confined. What the necessary element of publicity must amount to in order to come within the language of the rule is a matter which we are not called upon to define. It is really one of those cases, I cannot help thinking, which must answer themselves, and I am prepared to hold and to hold without hesitation that the director of a company incorporated under the Companies Acts is the holder of a public office. So much for that argument.

The next argument that is put forward on behalf of the respondent is that the test of locality which should be applied for the purpose of finding out whether an office is or is not within

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the United Kingdom lies in the question: where are the functions of the office performed? It is said that in the present case all the functions of the office are performed by the respondent outside the United Kingdom. It is important to bear in mind, in relation to that argument, the real nature of the office of a director. The word "office" is not infrequently used as a synonym for "employment," but the office of director is something quite different from the employment of an agent or even the employment of a Crown servant. Under a contract of mere employment, the tasks to be performed by the employees are to be performed in the place which the contract indicates, and if a person is employed as agent abroad of an English company, his task is to perform the duties of that agency abroad, and I can well see why in a case of that kind it would not be possible to say that an agent held an office within the United Kingdom; he would fall to be assessed, if he is assessable at all, under Schedule D and not under Schedule E—that is, before the Act was amended. But, in the case of a director, the position appears to me to be entirely different. What I am saying deals and deals only with this particular company, and I have no intention of expressing any opinion as to what might happen in the case of a director of an English company whose seat of government was in a foreign country. In such a case, there may be an argument for saying that different considerations apply; I say nothing about it, because it is not relevant to the consideration of the present problem and I express no opinion one way or other; but, in the case of a company situated and governed as this company is, it is to be remembered (and this appears to me to be the crucial matter) that every right which a director has and every duty which the law, general or special, imposes on the director is to be exercised in this country and nowhere else. As a test of that, in the matter of the directors' rights, it must be remembered that a director is entitled to ask the assistance of the courts of this country to enable him to exercise those rights. If he is excluded by his fellow directors from the board room, he is entitled to obtain the assistance of the courts here to secure entrance for him. That brings out one of the differences between the case of a director of a company and the case of a person who is merely employed by a company. Such a person has no such specific rights which will be specifically safeguarded by the courts. If he is excluded from the job for which he is employed, his remedy is a remedy in damages. A director, on the other hand, has a definite specific right which is entitled to protection.

In the case of an ordinary director who does, in point of fact, perform the duties of a director in this country, it cannot be questioned that Schedule E applies to him. The problem is on the facts of this case to ascertain what is the true test of the locality of the office. We have here, on the one hand, functions performed in the United States and in Canada which are outside the normal duties of a director; we have the normal duties of a director exercisable, if he were minded to exercise them, in England and nowhere else; we have the normal rights of a director enforceable, if he were minded to enforce them, in England and nowhere else. It appears to me that the office is tied to this country by reason of those circumstances, and the fact that during any given period an individual director is not performing those duties or exercising those rights does not sever that tie. If the case be taken of a director who takes no part whatsoever in the company's affairs and does no work for it, who neither performs the duties nor exercises the rights of a director but chooses, let me assume, to live abroad, and, let me also assume, is not put as he is not in the present case put, by the articles of his company under compulsory retirement if he fails to attend board meetings, it could not be suggested, it appears to me, that such a director would not be properly described as the holder of a public office within the United Kingdom or as a person having a public office in the United Kingdom. If he has not an office in the United Kingdom, where has he? It seems to me that in such a case the applicability of Schedule E is beyond question.

The present case is but a variant of that. It is precisely on all fours with the facts I have suggested in the assumed case, with the added circumstance that the director in question is voluntarily and without remuneration doing work for the company in the United States. Does that superadded fact really alter the position? In my opinion, it does not. It seems to me that the basic fact remains that the office qua office and considered as a complex of rights and duties is a thing which is tied to and bound up with the locality of the company itself. These added voluntary functions are something outside the basic duties and rights of the office, and the fact that they have been added to those basic rights and duties which still remain does not operate to disassociate the office of this director from the company in England. Those appear to me to be the real conclusive arguments which displace the claim of the respondent in this case.

A number of authorities were referred to. I do not find any real assistance from them, but there are one or two of them to which I must refer. Mr. Hills referred to two cases decided under Schedule D, *Pickles* v. *Foulsham* (1) and *Bennett* v. *Marshall* (2). Those were cases under Schedule D and were decided in reference to the language of that Schedule, which is different from the language of Schedule E. I do not find that those cases really assist me in the decision of the present question. But there were cases referred to by Mr. Tucker and Mr. Donovan with regard to which I must say a word. The earliest of those was the case of *Barson* v. *Airey* (3). That was a case where the chairman of the board of a British company earned certain additional remuneration in respect of services performed by him for the company when on visits to China. The only argument in that case was that the additional remuneration which he received in respect of those services could be disassociated from his office of director. The General Commissioners found as a fact that that additional remuneration was paid to him as chairman of the company for services rendered by him as a director. The only question when the matter came before the court was whether there was evidence to support that finding. It does not appear to me that there is anything in that case which bears on the present question. The taxpayer there was a chairman of directors, and he performed the normal duties of a director in this country during the period of assessment in question, save for the fact that during that part of the period he was away in China. He was, therefore, unquestionably having or exercising the office of director in this country, and when once the decision was reached and accepted, as it was accepted in that case, that the extra remuneration earned by what he did in China was payable to him in his capacity as director, the whole of his emoluments as director were caught by Schedule E. In other words, you cannot split up an office under Schedule E and refer part of the remuneration paid for it to what is done in England and part to what is done abroad ; provided it is an office within the United Kingdom then any additional remuneration for work done abroad is caught by the Schedule. It appears to me that there is nothing in that case which assists in the decision of the present case.

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(1) [1925] A. C. 458; 9 Tax Cas. 261.

(2) [1938] 1 K. B. 591; 22 Tax Cas. 73.

(3) 10 Tax Cas. 609.

The next case to which I shall refer (it is not in order of sequence, because I reserve for the last the case which more directly affects the present decision) is the case of *Corry* v. *Robinson* (1). That was the case of an established civil servant who held the position of deputy cashier in His Majesty's naval base at Singapore and the question arose as to his salary and certain allowances. The taxpayer there was a person whose entire functions and duties had to be exercised in Singapore. He was not in the least in a position similar to that of a director of a company, but he was merely an employee of the Crown employed in Singapore for the purpose and the purpose only of performing duties in Singapore. It is true that his position is referred to as an office, but in truth and in fact it was merely an ordinary employment under the Crown. In other words, the only element of locality in the case except the actual situation of the employer, the Crown, was in Singapore, and it is difficult to see in such a case, if it had not been for certain special language in the rules, why the office, if it were regarded as an office, should not be held to be located outside the United

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(1) [1934] 1 K. B. 240; 18 Tax Cas. 411.

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Kingdom. But in that particular case that conclusion could not be reached because of the special language of r. 18 of Schedule E. That rule makes special provision for employees of the Crown or holders of offices under the Crown. Sub-r. 1 provides : "The tax shall be assessed and charged by the "respective commissioners for all the offices in each department, in the place where the said commissioners execute their "offices, although certain of the offices in the same department "may be executed elsewhere." Then sub-r. 2, which is the important one, is : "A person chargeable in respect of an "office or employment of profit shall be deemed to exercise it at "the head office of the department under which it is held, and "shall be assessed and charged at that head office, although the "duties of the office or employment are performed, or any "profits thereof are payable elsewhere, whether within the "United Kingdom or not." The taxpayer in *Corry* v. *Robinson* (1) came exactly within that sub-rule. He was the holder of an office or, as I should have preferred to put it, he was employed under a Government Department, and the rule provides that such persons are to be deemed to exercise the office or employment at the head office of the department. Accordingly, it was held that he was assessable under Schedule E in respect of the entirety of his remuneration.

In passing, I should say that in the present appeal an argument was based on that sub-rule, because it was said that the reference to the exercise of the duties of the persons there referred to as being possibly outside the United Kingdom indicated that throughout the Schedule the true test of the locality of the office is the place where its functions are performed. The argument, in my opinion, fails to apply to the present case, for the reasons which I have already given, that the functions and duties fall to be performed in this country and nothing could alter that circumstance, and the fact that certain extra things were done abroad cannot possibly alter it.

The next and last case to which I must refer is the case of *Proctor* v. *Ryall* (2). That was a decision of Rowlatt J. in

(1) [1934] 1 K. B. 240; 18 Tax Cas. 411.

(2) 14 Tax Cas. 204, 214.

the case of a foreign director of a British company. That director was responsible for the whole of the British company's continental business, but his only remuneration was a fixed salary paid by the company plus commission on the company's profits from trading on the Continent. He lived in Paris with his family, but he came to London once a month to attend the company's meetings and he was assessed under Schedule E. It was held by the Special Commissioners and by Rowlatt J. that the office was an office within the United Kingdom, and I should have thought that there was no real difficulty in coming to that decision on any view, because he was actually attending board meetings. But Rowlatt J. made some observations which I approach, as I always do approach the observations of that learned judge on income tax matters, with very great respect. The learned judge says: "The "question then arises: What is the locality of an office, which "is an abstraction? .... In the Act of 1918 the words are "'having or exercising.' It seems to me that the place of "an office is where the officer 'has' or 'exercises' it. Rule 18, "sub-r. 2, to Schedule E, although, as I shall explain, I do not "think it directly affects this case, indicates by its language "(which goes back to s. 181 of the Act of 1803) that the place "of exercise governs. And Horridge J. obviously thought "that was the test when he decided *Pickles* v. *Foster* (1). "But where does the officer exercise his office? In the case "of a sinecure I should imagine he would exercise it at the "seat of the body under which he holds it. In ordinary "cases I will assume that prima facie the place of his duties "would be the main consideration, but, no doubt, the legal "nature of the post would require a close examination to see "whether it could be said to have a local existence anywhere "else. When the section dealing with the assessment of offices "in towns corporate and counties, which I shall have to refer "to in a moment, is looked at, it will be seen that offices in "companies are to be assessed where the company is, which "also, I think, supports the view I have endeavoured to "express..... I do not think it is safe to say that an office must

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(1) [1913] 1 K. B. 174; 6 Tax Cas. 131.

"necessarily be situated at the home of the company in which "it is held." Then the learned judge refers to *Pickles* v. *Foster* (1) and *Pickles* v. *Foulsham* (2), and he deals with the facts of the case before him, and continues: "I am bound to say I think I "must hold that his office is situate within the United Kingdom. "He is a director of this company and he comes here, and he "sits, not as an assessor or as a person called in; he sits, no "doubt, as a director under the articles, and I think he was "bound to sit. As I have already explained, I can only come "to the conclusion that, although it is an exceptional case, "and very technical—and, I think, very hard—it cannot be "said that his office is not an office in the United Kingdom." The learned judge there is considering the place where the functions were performed, and he lays particular stress on the fact that the director there did, in fact, perform functions in England by attending board meetings. But if the learned judge intended to express the general proposition that a director of a company, whose rights and duties, so far as this country is concerned, remain, so to speak, dormant while he does something special abroad, is to be taken as holding an office outside the United Kingdom on the ground that the only functions he performs are those special functions abroad, with great respect I cannot take that view. My reasons for declining to take that view sufficiently appear from what I have said in the earlier part of this judgment.

In the result, the appeal, in my view, should succeed.

CLAUSON L.J. I agree. I am satisfied, for the reasons that have been given by the Master of the Rolls, that my brother Lawrence was wrong in reversing the judgment of the Commissioners and that the Commissioners came to a right conclusion. I never differ from any judgment on income tax matters of my brother Lawrence without hesitation, but I am sure that courtesy to my learned brother does not require that I should swell the volume of the reports by repeating with mere variations of language the views which have been

(1) [1913] 1 K. B. 174; 6 Tax Cas. 131.

(2) [1925] A. C. 458; 9 Tax Cas. 261.

expressed by the Master of the Rolls, in the whole of which I concur.

Goddard L.J. I agree.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Goulden, Mesquita & Co.*

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Nov. 26, 27; Dec. 13.

SOTHERN-SMITH *v.* CLANCY (INSPECTOR OF TAXES).

Revenue—Income tax—Contract by insurance society for annual payments in consideration of single premium—Payments to assured for life—If aggregate of annual payments to assured less than capital invested payments to be continued to named person until that amount paid—Whether annual payments to named person income or capital in hands of recipient—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III.*

S. entered into a contract with an insurance society whereby in consideration of a single payment the society undertook (1.) that they would pay him an annual sum during his life; (2.) that in the event of his death before the sum of the annual payments equalled the capital invested, they would make annual payments of the same amount to a named recipient until the sum of the annual payments equalled the capital invested. S. having died before the annual payments equalled the capital invested the society continued to make the annual payments to the recipient:—

Held, that the contract was to pay an annual sum for an ascertainable period of years or for the period of the life of the annuitant, whichever might prove to be the longer, and in the event which had happened these payments to the recipient were the ordinary payments of an annuity and therefore that they were chargeable to tax under Case III. of Sch. D to the Income Tax Act, 1918.

Perrin v. *Dickson* [1930] 1 K. B. 107; 14 Tax Cas. 608 distinguished.

Decision of Lawrence J. ([1940] 2 K. B. 276) reversed.

APPEAL from the decision of Lawrence J. (1) on a case stated by the Special Commissioners of Income Tax.

Mrs. E. M. Sothern-Smith, the respondent, appealed to the Special Commissioners against assessments to income tax under Sch. D for the years 1935–36, 1936–37 and 1937–38, in the sums of 1793*l.*, 1763*l.* and 1750*l.* respectively. Included in the amounts of the assessments were certain sums in respect of payments made to the respondent by the Equitable Life Assurance Society of the United States in pursuance of a contract dated December 24, 1928, made between the Society and a Mr. E. H. S. Sothern (the annuitant).

By that contract (which was based on an "annuity application" by the annuitant) the society in consideration of the

(1) [1940] 2 K. B. 276.

payment by the annuitant of $65,243.22 (called in the contract "capital invested") agreed to pay him an annual sum (called in the contract an "annual annuity") of $6510 during his lifetime. The society guaranteed that, while the aggregate amount of the annual payments to be made might amount to more, it should not in any event amount to less, than the amount of the capital invested, unless the contract were determined by surrender. The aggregate amount might exceed the capital invested, if the annuitant himself were to live long enough to draw more by way of annuity than the $65,243.22. If, on the annuitant's death, the sum of payments already made equalled or exceeded this amount, the contract was at an end. In the event, however, of the death of the annuitant before the annual sums paid equalled the amount of the capital invested, the society undertook to continue payments of the annuity to the annuitant's sister (the respondent) if living, and, if not living, then to the annuitant's wife until the total amount of the payments made under the contract should equal the amount of the capital invested. If the annuitant and the beneficiary both died before the sum of the payments equalled the amount of the capital, the subsequent payments were to be made to the personal representatives of the last survivor of the annuitant and the beneficiary. There was a provision enabling the annuitant to surrender the annuity for its cash surrender value which was never exercised.

The annuitant died on December 28, 1933, when the aggregate amount which had been paid to him amounted only to $26,040. In fulfilment of the contract the society had made each year since then annual payments of $6510 to the respondent. In each of the assessments appealed against there was included the annual sum of $6510 converted into sterling, and the ground of the appeal by the respondent, who was a British subject ordinarily resident in the United Kingdom, was that these sums were capital and not income, being annual instalments of a fixed capital sum of $39,203.22 in respect of which the society became indebted to her under the contract on the death of the annuitant and were therefore wrongly included.

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The Special Commissioners were of opinion that the contract was made to secure payment of an annuity to or by the direction of the annuitant; that the annuity was income in the hands of the recipient; and that the fact that in the events that happened the aggregate of the periodical payments was limited to the amount of the capital invested did not alter the character of the payments so as to make them repayments of capital.

Lawrence J. said that the authorities showed that annuities or annual payments, whether for life or for terminable periods, might be either of a capital or of a revenue character. *Perrin* v. *Dickson* (1); *Inland Revenue Commissioners* v. *Ramsay* (2) and *Dott* v. *Brown* (3). Therefore the question whether the payments were capital or income turned on the construction of the contract. In his opinion the contract contemplated that the capital invested should be refunded in any event. It made no difference that there was no pre-existing debt. The only question was whether the contract constituted a debt. Here the capital never ceased to exist nor did the respondent's brother ever adventure it. The payments to the respondent were therefore capital.

The Crown appealed. The appeal was heard on November 26 and 27 and judgment given on December 13, 1940.

Sir Donald Somervell A.-G. and *R. P. Hills* for the appellant. Annuities are charged expressly to income tax under Sch. D, Case III. But what is called an annuity may be a capital payment and therefore not subject to tax. In the present case, the covenant was to pay the annuity to the original covenantor for his life, with a proviso that the payments, if he died before they amounted to a certain sum, were to be continued to a nominee of his until they reached that sum. The question now is whether those payments to his nominee (who is his sister) are taxable as payments of an annuity or are simply repayments of capital.

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(1) [1929] 2 K. B. 85; in C. A. [1930] 1 K. B. 107; 14 Tax Cas. 608.

(2) (1935) 20 Tax Cas. 79.

(3) (1936) 154 L. T. 484.

The annuity is plainly an ordinary life annuity calculated with regard to expectation of life although the amount reflects the condition with regard to future payments to the beneficiary. But the company may find itself liable to pay far more than the single premium with the interest calculated on it.

There is no word indicating that the transaction is in the nature of a loan. Something of that kind might have assisted the respondent. The appellant relies on the fact that the payments to the beneficiary are described as "continued "payments": and the words are appropriate to indicate that the sum originally paid by the annuitant is only being treated as the measure of time over which annual sums are to be paid.

The present case has both the circumstances and the incidence of an annuity. The annuity is originally a plain life annuity: and all that is superadded is a condition that when the man dies the payments are to continue in certain circumstances for a period measured by the original lump sum paid.

It is important to remember that the Courts have recognized that terminable as well as life annuities are annuities within the meaning of the Income Tax Acts.

They referred to *Coltness Iron Co.* v. *Black* (1); *Scoble* v. *Secretary of State for India* (2) and *Jones* v. *Inland Revenue Commissioners* (3).

Perrin v. *Dickson* (4) is the case which caused most discussion in the Court below. In it, *Foley* v. *Fletcher* (5) was cited on the meaning of the word "annuities." [They referred to *Dott* v. *Brown* (6) and *Howard de Walden* (*Lord*) v. *Beck* (7).]

In this case the whole of these payments were to be treated as payments of income.

Cyril King K.C. and *N. E. Mustoe* (for *J. W. P. Clements*, on

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(1) (1881) 6 App. Cas. 315; 1 Tax Cas. 287, 307.

(2) [1903] A. C. 299; 4 Tax Cas. 478.

(3) [1920] 1 K. B. 711; 7 Tax Cas. 310, 314.

(4) [1929] 2 K. B. 85; and in C. A. [1930] 1 K. B. 107; 14 Tax Cas. 608, 615.

(5) (1858) 3 H. & N. 769, 784.

(6) 154 L. T. 484.

(7) [1940] Tax Leaflet 1050.

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war service) for the respondent. This contract is different from that of the ordinary life policy for a lump sum when that sum is paid on the footing that none of it is paid back. Here the sum invested was to be paid back to the annuitant or his nominee and it was only if he lived for more than ten years that a profit ensued which could properly be treated as income. In the events which have happened there is no element of profit. Mr. Sothern was in the position of an ordinary life annuitant but on his death a fixed sum, namely, the balance of the sum invested not yet repaid, became payable by annual instalments. Therefore, these payments have all the properties of capital. The respondent is not receiving payments during her life. It is like the case of a terminable annuity where the capital paid can be traced as being repaid: see *Perrin* v. *Dickson* (1). Even when there is no sale of property and payment of the purchase price in instalments, the position should be analysed to see what is the true effect of the contract: *Scoble* v. *Secretary of State for India* (2) and *Perrin* v. *Dickson* (1).

An analysis here shows that there is no interest item in the annual payments. The Crown has not suggested that there can be any suggestion of an income tax on part of the payments and the Crown has not since the decision in *Perrin* v. *Dickson* (1) attempted to tax the capital element in a terminable annuity. There is no need here, however, to argue the wider question of a terminable annuity. In the case of a life annuity the annuitant is said to have bought an income payment with his capital: *Foley* v. *Fletcher* (3). As soon as Mr. Sothern died the society became liable for a debt although it was only payable in annual amounts. These annual payments are therefore payments of capital. There was an outstanding loan creating a debt: see *Perrin's* case (1). This case is directly in point in the present case and it is binding on this Court. The annual payment made chargeable to income tax by Case III. of Sch. D to the Income Tax Act, 1918, must be an income payment in order to be taxable. *Foley* v. *Fletcher* (1), *Scoble's* case (2) and *Perrin* v. *Dickson* (3) are all in the respondent's favour and anything to the contrary in *Coltness Iron Co.* v. *Black* (4) is obiter dictum.

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(1) [1929] 2 K. B. 85; and in C. A. [1930] 1 K. B. 107; 14 Tax Cas. 608.

(2) [1903] 1 K. B. 494; [1903] A. C. 299; 4 Tax Cas. 478, 618.

(3) 3 H. & N. 769.

R. P. Hills for the Crown replied and referred to *Dott* v. *Brown* (5).

Cur. adv. vult.

1940. Dec. 13. SIR WILFRID GREENE M.R. On December 24, 1928, the Equitable Life Assurance Society of the United States made a contract with the late Mr. Edward H. S. Sothern whereby in consideration of the payment by him of a sum of $65,243.22 the society agreed to pay to him an annuity of $6510 during his life and after his death in a certain event to continue to make payments of the annuity for an ascertainable period to his sister the respondent. Mr. Sothern died on December 28, 1933, and assessments were made on the respondent for the three years 1935 to 1938 in respect of sums received by her under the contract. From these assessments the respondent appealed to the Special Commissioners claiming that the payments in question were not payments of income but were instalments of a capital sum. This claim was rejected by the Special Commissioners but their decision was reversed by Lawrence J. who held that the payments were payments of capital.

The case has throughout been conducted upon the footing that the respondent, although not a party to the contract, is entitled in law to claim from the society the sums which it agreed to pay to her. It may be that this is in accordance with the law of the State of New York by which the contract would seem to be governed.

The assessments were made under Case III. of Sch. D and the relevant provisions of the Income Tax Act, 1918, are as follows: "Schedule D.1 Tax under this Schedule shall be "charged in respect of . . . . (*b*) all interest of money,

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(1) 3 H. & N. 769.

(2) [1903] A. C. 299.

(3) [1930] 1 K. B. 107.

(4) 6 App. Cas. 315; 1 Tax Cas. 287.

(5) 154 L. T. 484.

"annuities and other annual profits or gains not charged "under Schedule A, B, C or E and not specially exempted "from tax . . . . for every twenty shillings of the annual "amount of the profits or gains. 2. Tax under this Schedule "shall be charged under the following cases respectively; "that is to say— . . . . Case III. Tax in respect of profits of "an uncertain value and of other income described in the "rules applicable to this case;" "Rules applicable to "Case III. 1. The tax shall extend to—(*a*) . . . . any annuity, "or other annual payment, whether such payment is payable "within or out of the United Kingdom."

It is clear that an annuity or other annual payment falls to be struck with tax as being an "annual profit or gain" and this is the reason why it becomes necessary to examine the nature of an annual payment in order to see whether it is in truth an income or a capital payment—a question which cannot be answered merely by pointing to the fact that it is annual. Questions of this kind are notoriously difficult and give rise to distinctions of a highly artificial character. The present case is no exception.

It is no doubt true to say that in order to answer the question the real nature of the transaction must be ascertained. This proposition has an engaging appearance of simplicity; but it is not so simple as it sounds. For the expression "the real "nature of the transaction" is ambiguous. It may mean the real nature of the legal relationship of the parties which results from the transaction—a matter which may not be in doubt: or it may include as well the real nature of the transaction from a financial point of view, a matter which at once raises a number of difficulties. If the transaction be one under which A., being or becoming indebted to B. for a sum of 1000*l*., agrees with B. to repay this sum by ten yearly instalments, or if A. being the purchaser of property from B. for 1000*l*. agrees to pay the purchase price by ten yearly instalments, the real nature of the transaction from the legal point of view is that A. is contracting to pay by instalments in the one case a debt and in the other a purchase price. In such cases the very nature of the legal relationship constituted by the contract prevents the annual payments from being anything but payments of capital. If to the instalments there is added an element of interest, that element would presumably attract tax as being an annual profit or gain—this would appear to be the result of *Scoble* v. *The Secretary of State for India* (1) and *Perrin* v. *Dickson* (2), although in *Foley* v. *Fletcher* (3) the opposite view was expressed.

But in other cases the real nature of the transaction from the legal point of view does not of necessity stamp it as a capital transaction. Let me take the simple case of a contract under which in consideration of a single payment by B., A. agrees to pay to him an annuity for a period of years. The legal nature of such a contract is beyond question. The property in the sum paid by B. passes absolutely to A.; no relationship of debtor and creditor with regard to that sum is ever constituted. The sum as a sum ceases to exist, when once it is paid. Its place is taken by A.'s promise to pay the annuity and B.'s only right is to demand payment of the annuity as it accrues due. If A. repudiates the contract, B. may sue for damages, the measure of damages being the sum of the payments still remaining to be paid, subject to discount. Is it then permissible to look behind the legal nature of the transaction and inquire into its financial nature? If this is done, it is at once apparent that the annual payments are calculated on the basis that at the expiration of the period of the annuity, B. will have received an amount equal to the sum which he paid together with a sum in respect of interest, for it is on that basis that in such a transaction the amount of the annual payments is calculated. That this is so will be self-evident from the figures themselves—it may even be stated in terms. The financial result of the transaction is therefore clear—at the end of the period B. will have received an amount equal to his capital plus a certain addition for interest and if each annual payment is struck with tax, he will in one sense be paying tax on capital. Nevertheless, it has throughout

(1) [1903] A. C. 299; 4 Tax Cas. 618.
(2) [1930] 1 K. B. 107; 14 Tax Cas. 608, 627.
(3) 3 H. & N. 769.

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been assumed by the courts that such payments are liable to tax. (See for example *Coltness Iron Co.* v. *Black* (1); *Jones* v. *Inland Revenue Commissioners* (2); *Perrin* v. *Dickson* (3). The reasoning in *Scoble's* case (4) seems to be based upon the same view.)

In *Perrin* v. *Dickson* (3) on the other hand, this court felt itself at liberty to hear extrinsic evidence as to the method of calculating the payments which fell to be made and upon the facts so ascertained, coupled with a particular term of the contract, to hold that they were of a capital nature. I must confess that I find the reasoning of the judgments in that case difficult to follow. In the events which happened the liability to make the annual payments became effective and in that aspect of the matter the case did not differ from the ordinary case of the purchase of an annuity for a period of years. The method of calculating the annual sums was apparently regarded as of importance; but it can scarcely have been regarded as decisive because the same method is used in the ordinary case of an annuity for a period of years and Lawrence L.J. at any rate did not regard himself as deciding that such an annuity would not be taxable (5). The other important element in the case was the undertaking of the insurance company to repay in an event which did not happen the whole or part (as the case might be) of what had been paid by way of premium. This seems to have led the Court to regard the whole transaction as similar to that of a loan repayable by instalments or (in one event) in a lump sum. My difficulty here is that the transaction certainly was not a loan transaction although I could better have understood an argument to the effect that it was a transaction which in the event which did happen was the purchase of an annuity and in the event which did not happen was in substance the repayment of the whole or part of what had been paid.

If the law were that in the ordinary case of an annuity for a term of years, the nature of the financial calculation involved stamped part of the payment as a capital payment, leaving only the interest element to be taxed on the ground that an annuity is only taxable in so far as it is a profit, the position would be simple and perhaps not unjust. In truth there is a basic distinction between such an annuity and a life annuity since in the latter case the sum of the payments which fall to be made may prove to be less or greater than the sum paid by the annuitant, while in the former case it will be the same as the amount paid together with an addition for interest. Upon this basis *Perrin's* case (1) would have been a clear one. But I do not feel myself at liberty in this Court to adopt any such principle. I feel bound to regard the purchase of an annuity of the kind to which I have referred as the purchase of an income and the whole of the income so purchased as a profit or gain notwithstanding the way in which the payments are calculated. The sum paid for the annuity has ceased to have any existence and the fact that at the end of the annuity period the recipient will have received an amount equal at least to what he paid I feel bound to treat as irrelevant. Nor do I think it can make any difference if this result is stated on the face of the transaction. *Perrin's* case (1) decides at any rate that the absence of such a statement cannot prevent the annual sums paid from being capital since extrinsic evidence was admitted; it appears to me to follow that the presence of such a statement cannot prevent them from being income.

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(1) 6 App. Cas. 315; 1 Tax Cas. 287, 308.

(2) [1920] 1 K. B. 711; 7 Tax Cas. 310, 314.

(3) [1930] 1 K. B. 107; 14 Tax Cas. 608, 627.

(4) [1903] A. C. 299; 4 Tax Cas. 618.

(5) 14 Tax Cas. 627.

I need not set out in detail the terms of the present contract. It bears upon its face statements to the effect that the result of its operation will be that the annual payments made under it will in the aggregate amount at the least to the sum paid by Mr. Sothern, while if Mr. Sothern were to live long enough they would exceed it. But the contract is in reality a contract to pay an annual sum to Mr. Sothern during his life with the added provision that in a certain event the payments will continue annually until an ascertainable date is reached, that date being fixed by reference to the amounts paid to Mr. Sothern in his lifetime. In other words, the contract is to

(1) [1930] 1 K. B. 107; 14 Tax Cas. 608.

pay an annual sum for an ascertainable period of years or for the period of Mr. Sothern's life whichever might prove to be the longer. There is no debt nor is there anything which can properly be described as analogous to a debt. The sum paid by Mr. Sothern has gone once for all; the reference to it in the contract is inserted not for the purpose of altering the nature of the company's liability, but for the purpose of putting a term to a liability which is throughout the same, namely, a liability to pay an annual sum. During Mr. Sothern's life the sums paid to him were payments of a life annuity: in the events which have happened, further annual payments fell to be made for a definite period and the fact that this period was ascertained by reference to the capital sum paid by Mr. Sothern and the amounts received by him during his life cannot, in my opinion, make these further payments anything different from the ordinary payments of an annuity for a fixed term. Mr. Sothern purchased an income and the capital amount which he paid only came into the matter for the purpose of defining the shortest period during which that income was to be paid. I do not find anything in *Perrin's* case (1) which persuades or compels me to come to a different conclusion.

Lawrence J., from whom I am respectfully differing, thought that the capital sum paid by Mr. Sothern never ceased to exist and that the contract in express terms guaranteed that the capital invested should be refunded or returned. I do not take this view. It seems to me that the capital sum did cease to exist when once it was paid; and that the so-called guarantee was an undertaking not to refund a capital sum or any part of a capital sum, but to continue annual payments for an ascertainable period. The view taken by Lawrence J. would appear to lead to the result that every annuity payable for a period of years would escape taxation, if it were pointed out upon the face of the contract that at the conclusion of the annual payments the annuitant would have received sums amounting in the aggregate to the sum or sums which he had paid for the annuity together with an allowance for interest.

In my opinion the appeal should be allowed.

(1) [1930] 1 K. B. 107; 14 Tax Cas. 608.

CLAUSON L.J. This is an appeal by the Crown against a decision on June 5, 1940, of Lawrence J. The Special Commissioners had decided that Mrs. Sothern-Smith was liable for income tax on certain payments made to her by an insurance company under what is called a " Refund Annuity Contract " made by the company with her late brother. Lawrence J. took the view that the payments made to the lady under her brother's contract were payments of a capital character and not chargeable to income tax in her hands.

The contract in question had been made by the brother, Mr. Sothern, on December 24, 1928, apparently in New York, and the company's payments thereunder were to be made in New York. The contract is in a form unfamiliar in this country but may be summarized as follows. In consideration of a payment of $65,243 by Mr. Sothern to the company the latter became bound to pay $6510 to Mr. Sothern on the first and each subsequent anniversary of the date of the contract during his life and like payments were to be made after his death up to an aggregate of $65,243 if the total annuity payments made during his lifetime should fall short of that sum, the payments to be made to a named beneficiary, if living, or after the death of both Mr. Sothern and the named beneficiary, to the executors of the survivor. Mr. Sothern might change the beneficiary during his own lifetime. After the contract had been in force for two full years Mr. Sothern had the right to surrender the contract and receive the commuted value (discounted at 4 per cent. compound interest) of the future payments necessary to make up the total payments by the company to the figure of the original consideration, namely, $65,243.

Mr. Sothern died on December 28, 1933, having according to the stated case received from the company under the contract $26,040, that is, four annual payments of the agreed sum of $6510. Since his death the company has made annual payments to Mrs. Sothern-Smith, the beneficiary named by Mr. Sothern, of $6510 presumably up to the figure of $65,243, which in the event, which had happened, of Mr. Sothern's death in 1933 is the limit of the company's liability.

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It was agreed that it was unnecessary to discuss whether, according to the law governing the contract, Mrs. Sothern-Smith could have sued the company for these payments, whether alone or with the concurrence of her brother's representatives.

The case for the Crown, which commended itself to the Special Commissioners, was that these payments to Mrs. Sothern-Smith were taxable as annuities. For Mrs. Sothern-Smith it was contended (and this contention commended itself to Lawrence J.) that the payments made to her were annual instalments of a fixed capital sum in respect of which the company became indebted to her under the contract on the death of the contracting party. It was not necessary to decide whether the payments made under the contract to Mr. Sothern during his life were chargeable to income tax as annuities. From the wording of clause 9 in the Special Case I should gather that the Special Commissioners regarded all the annual sums payable under the contract as falling within the description of annuities and accordingly chargeable to income tax. Lawrence J. refrained from dealing with any question arising upon the sums paid by the company to the original contracting party.

Similar questions to the present have been before the courts on many occasions, but the principles to be applied in considering whether in a particular case periodical payments are or are not chargeable to tax under the Acts are well established though not always easily applicable to the particular circumstances. I do not propose to examine the earlier authorities, but merely to take the statement of these principles as enunciated in this court in the case of *Perrin* v. *Dickson* (1). In delivering judgment in that case, Lawrence L.J., after referring to *Foley* v. *Fletcher* (2) and *Scoble's* case (3), said this: "The principle upon which both these cases were "decided is that it never was the intention of the Income "Tax Acts to tax capital as if it were income, with the result "that, even although a contract may provide for the payment "of annual sums of fixed amount and may call such payments

(1) [1930] 1 K. B. 107.
(2) 3 H. & N. 769.
(3) [1903] A. C. 299.

"'an annuity,' the court will in each case inquire into the "real nature of the transaction, and if it appears that in fact "part of such sum represents payment of capital, such part "will not be chargeable with income tax. Both these cases "however distinctly recognise that in the case of a simple "purchase of an annuity in consideration of a money "payment the full amount of the annuity is chargeable with "income tax. The distinction which is apparently drawn in "these cases is between a purchase of an annuity for a fixed "term in consideration of the payment of a sum of money and "a contract to pay an annuity in consideration of the conveyance of land or other property." As I understand, his Lordship intends to point out that the annuity first mentioned will be chargeable to income tax, while that secondly mentioned will not.

Applying to the present case this statement of the principles applicable it appears to me that the only possible conclusion is that the payments made by the company under the contract are all taxable. It seems clear that if the contract had merely been to pay 6510 dollars for the number of years and the fraction of a year which were requisite for making up the total payments of $65,243, this would create a taxable annuity. The addition to such a contract of a further liability to pay the same nominal sum to the contracting party for the rest of his life if he should survive that period, can surely not alter the character of the payment, especially when it is borne in mind that no one has ever doubted that a contract to pay an annuity for a period measured by life, whether in consideration of a lump sum down, or a series of successive periodical payments (usually called premiums) must be taken to be an annuity chargeable to tax. The view I have expressed was, as I understand, the view taken by the Special Commissioners.

The first line of attack made on this position by counsel for Mrs. Sothern-Smith was to argue boldly that the term "annuity" in the Acts meant and meant only " life annuity," and he pointed out that the present contract involved obligations on the company which were not terminated by the falling of a life, if the life fell before the period when the sums paid by the company reached the figure of the original cash consideration. It seems to me to be a sufficient answer that if "annuity" in the Acts means life annuity there was a short and conclusive argument available both in *Foley* v. *Fletcher* (1) and in *Scoble's* case (2) to defeat the claim that the periodical payments in question in those cases, which had no reference to life, were taxable as annuities, and the elaborate arguments in those two cases were superfluous and unnecessary.

There was however a further and, if I may say so, far more plausible argument put forward, and it was as follows. It was said that if the premiums or the sum of the premiums paid by the so-called annuitant must, under the terms of the contract, in any event be returned to him, that circumstance must be taken to show that the transaction is not the purchase of an annuity but is a mere investment of capital money with the company, to be repaid in due course with, in certain events, interest or other benefits. The payment made by the so-called annuitant was, it was said, capital of which it was not true to say that it ever has gone or has ceased to exist; it retains throughout its character of capital which passes away for a period from the so-called annuitant but is in due course returned to him: it is a mere loan to the company repayable on terms, and the sums paid (or rather, it was said, repaid) to the so-called annuitant were, to the extent of the sums paid by him, payments or rather repayments of capital: any moneys in excess of that amount paid under the contract might well be profits and taxable.

In my judgment it is not possible to treat the present contract as one of mere investment. It will be observed that if the contracting party dies before the time when the total amount of the $65,243 has come back to him or to those claiming under him in the form of annual payments, the net result is that he and those claiming under him have been out of the money for the period of roughly ten years, with no allowance of interest at all. That does not look much like an investment from the contracting party's point of view. So if

(1) 3 H. & N. 769.

(2) [1903] A. C. 299.

the contracting party lives beyond the same period the company comes under an obligation limited only by the duration of the contracting party's life, to keep up the annual payments. Such an obligation is, of course, an ordinary incident of an annuity contract, but it seems wholly alien to a mere arrangement for accepting money on loan.

The truth is that the transaction in the present case contains none of the characteristics of a contract of loan in which capital is handed over to be returned as capital. The $65,243 so far as the contracting party is concerned has, to use the language of Watson B. in *Foley* v. *Fletcher* (1) gone and ceased to exist, the principal having been converted into an annuity. The only continuing relation between the annuity and the vanished capital sum is that the amount of the vanished capital sum is arbitrarily taken to measure the minimum period for which the annuity is to run.

It was strongly urged that the fact that the repayments made by the company to the contractor in the case of *Perrin* v. *Dickson* (2) were held not to be chargeable to income tax made it necessary for this court to hold the like in the present case. The decision in *Perrin* v. *Dickson* (2) was based on the fact that each member of the court was satisfied that in that case the sums paid by Bishop Perrin were mere investments of capital, received and in due course repaid by the company: that the transaction was, as I understand their Lordships, merely one of a deposit of a fund with the company on the terms that the deposit should be repaid in one event without interest, but in the event of the whole scheme working out as anticipated, with compound interest calculated at 3 per cent. If that is the true view of the contract in question in *Perrin* v. *Dickson* (2), no doubt the repayments were not taxable but only the compounded interest. But it seems to me impossible to take a like view of the contract in the present case for the reasons I have explained above. Whether the view taken by the court in *Perrin's* case (2) of the nature of the contract was consistent with the circumstance that if Bishop Perrin failed to keep up the periodical advances or

(1) 3 H. & N. 769, 784, 785.

(2) [1930] 1 K. B. 107.

premiums which he was bound by the contract to make, he had no contractual right to recover them, is a question which might, if the case had to be considered in a court which had power to overrule that case, be a matter for serious consideration: as also whether the difficulty occasioned by the absence of such a contractual right could be properly treated as surmounted by evidence that it was the practice of the company in such circumstances to repay the advances or premiums. In whatever way these questions might be resolved by a court which had power to overrule the decision in *Perrin* v. *Dickson* (1), there remains the crucial distinction between that case and the present, that in that case the company's liability could never exceed the amount of the premiums with the compound interest at 3 per cent., while in the present case the contract involved the company in a possible liability which, if Mr. Sothern lived for an unexpected number of years, might exceed the original payment and a reasonable rate of interest thereon by a very large figure. The existence of such a liability in the payee of the original capital sum appears to me to make the transaction differ crucially from a mere transaction of deposit or investment of a capital sum to be returned in due course as a capital sum. The transaction must in my view be treated as a parting with a capital sum as consideration for the grant of a number of periodical income payments, in other words for the grant of an annuity. I can thus find nothing in *Perrin's* case (1) which would induce, still less compel, me to hold that the view which I have formed as stated above of the nature and effect of the contract in question in the present case is otherwise than correct.

For these reasons I am of opinion that the decision of the Special Commissioners was correct, and that the order of Lawrence J. reversing their decision should not be upheld. Accordingly, in my view the appeal of the Crown should be allowed with the usual results.

GODDARD L.J. The difficulty that I have felt in this case is to determine whether it is distinguishable in principle from

(1) [1930] 1 K. B. 107.

Perrin v. *Dickson* (1), a decision which is binding on this court. The fine distinction between an annuity properly so called for tax purposes and an annual payment which is in truth a capital payment, whether in discharge of a pre-existing debt or not, has repeatedly been emphasized, and no sure or simple test has or can be laid down for the solution of this problem. The only principle that I can deduce from the cases is that the court must have regard to the true nature of the transaction from which the annual payment arises and ascertain whether or not it is the purchase of an annual income in return for the surrender of capital. If it is the purchase of an income the annual payment is taxable; if it is a capital payment it is not, though in the latter case if the annual sum represents a payment or a return of capital coupled with interest, the sum may be dissected and tax charged on so much as represents interest. Now in the case of a whole life annuity the sum paid is not in truth a return of capital plus interest. The annual payment is calculated on the grantee's expectation of life. He is to receive during his life an annual sum considerably in excess of the normal interest that he would obtain on an investment, while the grantor takes the risk of the life being prolonged beyond a period which will yield a profit to him on the transaction. The grantee retains no interest in the capital when once it has been paid; it becomes the property of the grantor. The present case as between the company and the late Mr. Sothern, is, in my opinion, one of an ordinary life annuity with an additional benefit attached, the company agreeing that in no event will they pay less than the amount of the capital that they received from the annuitant. I find it difficult to see why a payment to be made after his death to his nominee or to his executors, if the nominee should also have died, or if they had been nominated as beneficiaries, should change in character or quality, becoming capital and not income merely because the measure of the payment or payments is limited to an amount which added to what has already been paid to the grantee will be equivalent to the amount originally

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paid by him to secure the income. In *Perrin* v. *Dickson* (1) it was found in the case that the sum to be paid to the parent for the education of his child was, if the child survived for the whole period, the amount of the premiums plus 3 per cent. compound interest. The contract provided that if the child died the parent was to be paid the total amount of the premiums paid without interest less any sum that might already have been received. The court held, as I understand the decision, that the true nature of the transaction was no more than the accumulation, or saving, by the parent of a fund at compound interest to be applied when the time came for the education of the child, or returned to him without interest in the event of the earlier death of the child. In that view of the facts, the transaction was in no sense an annuity and is quite different in quality from that which we are now considering. The opinion that I have formed makes it unnecessary to consider what effect, if any, the decision in *Perrin's* case (1) may have on terminable annuities. Obviously the transaction was closely akin to the grant of such an annuity, and the court held that only so much of the payments as represented interest was taxable. It may yet have to be decided whether that principle must be applied to all cases of deferred terminable annuities, but as in my opinion this is in truth not a case of a terminable but of a whole life annuity with an added benefit, I need express no opinion upon the question.

I think that the decision of the Special Commissioners was right and should be restored.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Scott & Son.*

H. C. G.

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(1) [1930] 1 K. B. 107.

MERCHANTS AND MANUFACTURERS INSURANCE COMPANY, LIMITED *v.* CHARLES AND JOHN HUNT (AN INFANT) AND PERCY THORNE AND MATILDA THORNE.

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Nov. 14, 15, 27;
Dec. 19.

Insurance—Motor-car—Policy—Insured sued by third parties injured—Insurers claim declaration that entitled to avoid policy—Third parties added as parties to insurers' action—Admission of alleged non-disclosure and misrepresentation by assured—Inadmissible against added parties—Declaration not granted as against added parties—Grant of declaration, in discretion of Court—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 2, 3, 5.

Insurers, pursuant to s. 10, sub-s. 3, of the Road Traffic Act, 1934, sued their insured for declarations that, apart from any provision in the policy, they were entitled to avoid it, on the ground that it was obtained by the non-disclosure of material facts or by a representation of facts which was false in material particulars. Plaintiffs, who were suing the insured in an action for damages for personal injuries received from collision with the insured motor-car on the ground of the driver's negligence, and who, if they recovered judgment against the insured, by the terms of sub-s. 1, notwithstanding that the insurers might be entitled to avoid the policy, could, subject (inter alia) to the provisions of sub-s. 3, recover their damages and costs from the insurers, were given notice by the insurers pursuant to the proviso to sub-s. 3, specifying the non-disclosures or misrepresentations on which they proposed to rely. Pursuant to that proviso these plaintiffs were added as parties to the insurers' action for declarations. The insurers claimed two declarations: the first in general terms following the words of sub-s. 3 and the second that they were under no liability to indemnify the insured—the policy holder and his son, the driver of the car—in respect of any damages or costs which might be awarded against them in the action by the added parties. The only evidence tendered on the issue of the insurers' action that the policy was obtained by such non-disclosures and misrepresentations was inadmissible as against the added parties, but although objected to on their behalf, it was admitted. The trial judge held that the insurers by a provision in the policy had expressly contracted out of the right conferred upon them by sub-s. 3, to escape from the liability imposed upon them by sub-s. 1. On appeal it was contended for the defendant insured that the duties of disclosing all, or of not misrepresenting any, material facts were not duties existing at common law or in equity, outside the insurance contract, but that each of them was just an implied condition of the

Reported by C. G. Moran, Esq., Barrister-at-Law.

contract which in the case of this policy was superseded by express conditions in the contract, covering the same ground or inconsistent therewith, only negativing liability for payment on breach thereof. The declarations sued for must, by the terms of sub-s. 3, be apart from any provision in the policy. It was contended for the insurers (1.) that the function of the added parties was merely to see that the insurers' case was properly proved against the defendant insured and to watch against possible collusion between the insurers and insured, and (2.) that when once the insurers had proved against the defendant insured that the policy had been obtained by the policy holder by such non-disclosures and/or misrepresentations the insurers were entitled by the very terms of sub-s. 3 to a declaration, ex debito justitiæ :—

Held, that the added parties were defendants to the action and as such entitled to strict proof, as against them, of the facts on which the declarations were founded. Accordingly, the action failed as against the added parties.

The Court, assuming that it had power to grant the declarations sued for as against the insured, in the exercise of its discretion, refused to make either declaration.

Per Scott and Luxmoore L.JJ. Whatever might be the law with regard to non-disclosure of material facts, the right to avoid a contract, whether of insurance or not, induced by misrepresentation, did not depend on any implied term of the contract, but arose by reason of the jurisdiction, originally exercised by the Court of Equity, to prevent imposition: and per Scott L.J. *semble* the common law duty to make full disclosure of material facts was not merely based on an implied term of the contract.

Judgment of Stable J. dismissing the action upheld, but on other grounds.

Appeal from a judgment of Stable J.

The history and facts of the case were stated by Luxmoore L.J. in his judgment as follows: On September 1, 1938, one Charles Hunt filled in and signed a proposal form and declaration requesting the Merchants and Manufacturers Insurance Company, Ld. (hereinafter called "the company") to issue to him a policy of insurance in respect of (among other things) his liability to third party risks in respect of a Vauxhall motor car belonging to him and described in the proposal form. The period of the insurance was for one year from September 1, 1938, to September 1, 1939. The proposal and declaration contained a number of questions which were answered by Charles Hunt. Although a number of these questions and the answers thereto were referred to during the hearing out of which this appeal arises, it is only necessary to refer to two of such questions, namely: "7 (*d*) Have you or any "person, who to your knowledge will drive the car, ever been "convicted of an offence in connection with a motor vehicle "or motor cycle or is any prosecution pending?" Answer: "No." and "8 (*a*) Will the car be driven by any person under "21?" Answer: "No." The declaration contained the following statement: "I hereby warrant the truth of the above "statements and I declare that I have withheld no information "whatever which might tend in any way to increase the risk "of the company or influence the acceptance of this proposal."

The proposal was accepted by the company and a policy of insurance issued to Charles Hunt in accordance therewith on September 5, 1938. The policy so issued provided, among other things, that, subject to the terms, exceptions and conditions contained therein and of any endorsement thereon, the company would indemnify as thereinafter mentioned Charles Hunt (therein described as "the insured"). The policy sets out under the heading "Indemnities under this "policy" the indemnities afforded thereby. These indemnities so far as material to be stated included, under the heading "Section 1: Liability to Third Parties," a provision that the company would indemnify the insured in the event of accident caused by or through or in connection with the said motor car in Great Britain and certain other specified territories against all sums, including claimant's costs and expenses, which the insured should become legally liable to pay in respect of death of or bodily injury to any person, except where such death or injury arises out of and in the course of the employment of such person by the insured, and that in the terms of and subject to the limitations of and for the purposes of the said section, the company would treat as though he were the insured any person who was driving the said motor car on the insured's order or with his permission, subject to certain provisos which are not material to be stated.

The policy also provided that the proposal and declaration made by Charles Hunt for the policy in question should be the basis of the contract of insurance thereby effected, and should be deemed to be incorporated therein, and that the truth of the statements and answers in the proposal should be conditions precedent to any liability of the company to make any payment under the policy (Proviso (a)). It further provided that nothing in the policy should affect the right of any person indemnified thereby or of any other person to recover an amount under or by virtue of the provisions of, among other enactments, the Road Traffic Act, 1934, s. 10, but that the insured should repay to the company all sums paid by it which the company would not have been liable to pay but for the provisions of (among other enactments) the Act and section above mentioned. The conditions contained in the policy included a condition numbered 8 which provided, among other things, that the truth of the statements and answers in the proposal should be conditions precedent to any liability of the company to make any payment under the policy. The policy issued by the company to Charles Hunt admittedly covers such liability as is required to be covered by para. (b) of sub-s. 1 of s. 36 of the Road Traffic Act, 1930.

The company in due course issued to Charles Hunt a certificate of insurance in accordance with the provisions of sub-s. 5 of the same section. This last mentioned subsection provides, among other things, that a policy of insurance shall be of no effect for the purposes therein stated unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate of insurance in the prescribed form.

On October 8, 1938, the insured car, whilst being driven by John Hunt, the son of Charles Hunt, with the latter's consent, was involved in an accident in which the respondents, Percy Thorne and Matilda Thorne his wife (hereinafter referred to as "the Thornes"), suffered severe injuries.

On July 17, 1939, the Thornes issued a writ against Charles Hunt and his son claiming damages against them on the ground that the injuries sustained by them were caused by the negligent driving of the motor-car by John Hunt. This action has not yet been tried and is hereinafter referred to as "the Thornes' action."

It is provided by sub-s. 1 of s. 10 of the Road Traffic Act, 1934, that if, after a certificate of insurance has been delivered under sub-s. 5 of s. 36 of the Road Traffic Act, 1930, to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of sub-s. 1 of the last mentioned section (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount in respect of costs and any sum payable in respect of interest.

Sub-s. 2 of s. 10 provides that no sum shall be payable by an insurer under the provisions of sub-s. 1 thereof in respect of any judgment unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the bringing of the said proceedings: while sub-s. 3 of the same section provides that no sum shall be payable by an insurer under the said provisions if, in an action commenced before, or within three months, after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it; provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of sub-s. 3 as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person, who is the plaintiff in the said proceedings, specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto.

Sub-s. 5 of s. 10 provides that in that section the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and the expression "liability covered by the "terms of the policy" means a liability which is covered by the policy, or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy.

It is admitted that notice of the institution of the Thornes' action was given to the company and as the result of such notice the company in its turn on October 17, 1939, some six weeks after the expiration of the term covered by the policy, started an action against the Hunts (hereinafter referred to as "the company's action") for a declaration in accordance with the provisions of sub-s. 3 of s. 10. The notice required to be given by the proviso to the last mentioned sub-section was in due course given to the Thornes, who requested that they should be made parties to the company's action in accordance with the right conferred on them by the said proviso. On January 5, 1940, in compliance with such request the company, on its application, obtained an order in the company's action that the Thornes should be added as defendants thereto. The writ was subsequently amended in accordance with that order.

By its statement of claim in the company's action the company alleged that the policy issued to Charles Hunt was issued by the company in reliance by it on the truth of certain representations which were alleged to be false in certain material particulars. These representations are set out in para. 4 of the company's statement of claim and include the representations made in the answers to the two questions 7 (*d*) and 8 (*a*) contained in the proposal and declaration already referred to. The company alleged in

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the alternative that Charles Hunt by his answers to the said questions failed to disclose facts material to be made known in or about the making of the contract of insurance. The relief claimed by the company was (1.) a declaration that the company had at all material times been entitled to avoid the policy of insurance on the ground that it was obtained by the non-disclosure of material facts and/or by the representation of facts which were false in material particulars; and (2.) that the company was under no liability to indemnify the Hunts or either of them in respect of any damages or costs which might be awarded against them or either of them in the Thornes' action.

It was admitted at the trial that the two representations to which I have referred were made and that if they were false they were material within the definition of that word contained in sub-s. 5 of s. 10 of the Act, but no admission was made by the Thornes as to their falsity.

Evidence relied on by the company to prove the falsity of the two material representations was given by two witnesses. This evidence was objected to, but the objections were overruled. The first witness was a Mr. Wesson, the managing clerk to the solicitors acting for the company in the company's action. He stated that he had an interview with John Hunt on October 31, 1938, and that on that date he took a statement from him which John Hunt signed. The witness produced the original statement. It appears from the statement that John Hunt said his age was seventeen and a half years and that he had been convicted of four motoring offences, which are specified in the statement. The other witness was a Mr. Huckett, who at the time when the accident took place was the claims manager of the company. He stated that he had had an interview with Charles Hunt on November 4, 1938; that he showed to Charles Hunt the statement signed by John Hunt and that Charles Hunt in substance admitted that the information given by John Hunt in such statement was true.

Stable J. after considering the statements made by the witnesses called on behalf of the company, held that each

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of these representations was false and stated that he would have been prepared to make the first declaration asked for by the company, namely, that the company was at all material times entitled to avoid the policy on the ground that it was obtained by the representation of facts which were false in material particulars, had he not come to the conclusion that on the true construction of the material section of the Act and of the policy of insurance, the company had expressly contracted out of its statutory right to escape liability in respect of the rights given by statute to the Thornes. The learned judge therefore dismissed the company's action and ordered the company to pay the costs of the Hunts and the Thornes. The company appealed from this judgment and by the notice of appeal asked that a declaration in the form of the first declaration set out in the prayer to its statement of claim should be made against all the defendants, and that in any event a declaration should be made against the Hunts that the company are under no liability to indemnify them or either of them in respect of any damages or costs which may be awarded against them or either of them in the Thornes' action.

The appeal was heard on November 14, 15, 27, 1940.

Samuels K.C. and *Berryman*, for the appellants, submitted that the insurance company were not deprived of the rights conferred on them by s. 10, sub-s. 3, of the Road Traffic Act, 1934, by the provision in the policy that "nothing in this "policy . . . . shall affect the right of any person indemnified "by this policy or of any other person to recover an amount "under or by virtue of the provisions of (inter alia) the Road "Traffic Act, 1934, s. 10 . . . ." Any right conferred upon the Thornes by reason of this provision could only remain in existence if the contract of insurance were not avoided. [He referred to *Tattersall* v. *Drysdale* (1) and *Guardian Assurance Co., Ld.* v. *Sutherland* (2).]

Gerald A. Thesiger for the respondents, Charles and John

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(1) [1935] 2 K. B. 174.

(2) [1939] W. N. 122; 55 Times L. R. 576.

Hunt. The duties of disclosing all material facts and of not misrepresenting any material fact do not exist outside the insurance contract either at common law or in equity. Each duty with its consequence that, on failure of the duty, the contract can be avoided, is but an implied condition of the insurance contract.

In Halsbury's Laws of England, 2nd ed., vol. xviii., at para. 585 on p. 407, in dealing with the duty of a proposer to make full disclosure of all material facts, the authors state: "This "duty is imposed by the nature of the contract of insurance; "it is a common law duty, as opposed to a contractual duty." To this passage, however, is added note (x): "*Joel* v. *Law* "*Union and Crown Insurance Co.* (1). Nevertheless, it is "sometimes referred to as an implied term of the contract: "see e.g., *Moens* v. *Heyworth*" (2). In that case Parke B. said: "The case of a policy of insurance does not appear to "me to be analogous to the present; those instruments are "made upon an implied contract between the parties, that "everything material known to the assured should be disclosed "by them. That is the basis on which the contract proceeds." Lord Esher M.R., in *Blackburn, Low & Co.* v. *Vigors* (3), quoting Phillips on Insurance, 5th ed., at para. 537, where the author says that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake, says: "This seems to "me to be the true doctrine. The freedom from misrepresenta-"tion or concealment is *a condition* precedent to the right of "the assured to insist on the performance of the contract, "so that, on a failure of the performance of the condition "the assured cannot enforce the contract" (4). Lord Esher M.R. dissented in that case, but neither of the other judges, Lindley and Lopes L.JJ., dissented from this view. See also the observations in that case in the House of Lords of Lord Halsbury (5) and of Lord Watson (6) and the judgments of Jessel M.R. in *London Assurance* v. *Mansel* (7);

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(1) [1908] 2 K. B. 863, 886.
(2) (1842) 10 M. & W. 147, 157.
(3) (1886) 17 Q. B. D. 553.
(4) Ibid. 553, 561, 562.
(5) (1887) 12 App. Cas. 531, 536.
(6) Ibid. 531, 539.
(7) (1879) 11 Ch. D. 363, 367.

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of Cockburn C.J. in *Proudfoot* v. *Montefiore* (1); of Lord Alverstone C.J. and of Fletcher Moulton L.J. in *Joel* v. *Law Union and Crown Insurance Co.* (2) and (3) and of Branson J. in *Pennsylvania Shipping Co.* v. *Compagnie Nationale de Navigation* (4).

If the duties of full disclosure of material facts and of not misrepresenting any material fact (with the consequences of failure by the insured in those duties) are implied terms of the insurance contract they are necessarily superseded by any express terms in that contract covering the same ground. Expressum facit cessare tacitum. That is the case here in this policy, where by proviso (*a*) "the truth of the statements "and answers in the said proposal shall be conditions precedent "to any liability of the company to make any payment under "the policy" and by condition 8: "The due observance "and fulfilment of the terms, provisions and conditions of this "policy and of any endorsement thereon, in so far as they "relate to anything to be done or complied with by the insured "and the truth of the statements and answers in the said "proposal, shall be conditions precedent to any liability of "that company to make any payment under the policy." So in no event can a declaration to the effect that the company is entitled to avoid the policy be made, as the policy contains provisions to the effect that the truth of the statements contained in the answers to the questions in the proposal form is a condition precedent to the company's liability under the policy. The declarations sued for must, by the terms of sub-s. 3, be apart from any provision contained in the policy. The consequences both of non-disclosure of, and also of misrepresentation of, material facts are dealt with in the policy. The implied term is that on the failure of either duty the policy shall be avoided: the express term, substituted for it, is that full disclosure and non-misrepresentation are conditions precedent to the right of the assured to insist upon the performance of the contract—not to the existence of the contract. The contract sets out expressly what are to be the consequences of failure by the insured in either duty.

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(1) (1867) L. R. 2 Q. B. 511, 517.
(2) [1908] 2 K. B. 431, 438.
(3) Ibid. 863, 886.
(4) (1936) W. N. 254; 155 L. T. 294; 42 Com. Cas. 45.

[*Pickersgill* (*William*) *& Sons, Ld.* v. *London and Provincial Marine and General Insurance Co., Ld.* (1) was also referred to.]

Pritt K.C. and *M. Turner-Samuels* for the respondents Percy and Matilda Thorne. The contentions of the two sets of defendants do not conflict. My clients contend that the decision of the trial judge was correct on the grounds: (1.) that his Lordship's construction of the policy should be upheld, that the insurance company had in express terms abandoned the rights conferred upon them by sub-s. 3 of s. 10 of the Road Traffic Act, 1934; (2.) that the contention put forward by counsel for the defendants, Charles and John Hunt, is sound; (3.) that on the facts, the trial judge should have decided that the answers to questions 7 (*d*) and 8 (*a*) in the proposal form were not material, i.e., that they were not representations of fact which were false in some material particular and also that they could not be said to have induced the contract. On this head there is a subsidiary point that Mr. Charles Hunt only had to make representation as to matters of which he knew and the evidence was that at the time he gave his answer he did not know of his son's motoring convictions, and lastly (4.) that there was no admissible evidence against my clients. The convictions for four motoring offences by John Hunt were proved by his admission, as also was his age—seventeen and a half years. There was no evidence against the Thornes that John Hunt was likely to drive the car. These admissions were not admissible against my clients, the Thornes, and objection was made at the time to the admissibility of this evidence. Percy and Matilda Thorne were made parties to the action of the insurance company claiming these declarations: they were, therefore, defendants. On the issue whether such declarations should be granted there was no admissible evidence against them. (On the last point, he was stopped.)

Samuels K.C. in reply. A declaration was asked for against the insured and against them alone; but such a

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(1) [1912] 3 K. B. 614.

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declaration where granted would be binding on the added parties. The respondents, Percy and Matilda Thorne, were made parties to the action of the company, so that they could protect their interests; but they were not made defendants. This right was given them that they might be in a position to see that the case was properly proved against the defendants, Charles and John Hunt. The proceeding of adding the Thornes as parties is analogous to that of third party proceedings and the action was brought only against the defendants, Charles and John Hunt, the only persons against whom this relief can be sought. The Thornes could submit that evidence adduced was not evidence admissible against the Hunts; they were not entitled to submit that the evidence was not admissible against themselves. Collusion is possible between an insurance company and a policy holder and that is one reason why such plaintiffs have the right to be made parties.

In any case, on the facts found by the trial judge, the company is entitled to the first declaration as against the Hunts and to the second declaration sought, that the company was under no liability to the defendants, Charles and John Hunt, under the policy.

[Luxmoore L.J. The grant of a declaration is always discretionary.]

The statute grants the company a right to a declaration ex debito justitiæ, on their proving the facts here established.

Gerald A. Thesiger for the respondents, Charles and John Hunt. The grant of a declaration as against the Hunts only will be useless; for the company have all the rights they could obtain by a declaration given them by the terms of the policy. There was here no advantage to the company in putting the insured to the expense of an action pursuant to sub-s. 3 of s. 10 of the Act of 1934. Such a declaration would be useless and embarrassing. Further, the policy had expired before the company's action was instituted.

Cur. adv. vult.

1940. December 19. The following written judgments were delivered:

SCOTT L.J. This appeal concerns a policy of motor-car insurance, dated September 1, 1938, issued by the appellant company under s. 36 of the Road Traffic Act, 1930, insuring the respondent, Charles Hunt, and the class of persons therein mentioned, against third party liabilities.

The appellants ask for a declaration, following the words of s. 10, sub-s. 3, of the Road Traffic Act, 1934, that at the material date they were "apart from any provision contained "in the policy, ... entitled to avoid it on the ground that "it was obtained by the non-disclosure of a material fact, "or by a representation of fact which was false in some "material particular." If they obtained such a declaration they would escape the liability imposed upon them as insurers by sub-s. 1 of the same section to pay the amount of damages, interest and costs for which judgment might be given in an action brought against the respondents Hunt by the respondents Thorne, who had been injured as they alleged by the negligent driving of the insured car owned by the respondent Charles Hunt, and driven by the respondent John Hunt, an infant, and son of the respondent Charles Hunt, who, on the occasion of the accident, which injured the Thornes, was driving the car with his father's permission and was, therefore, within the class of persons protected by the policy, though not a party to it.

Before considering the facts of the case, or the relevant terms of the policy, it will be convenient to quote the essential provisions of the Road Traffic Act, 1934, upon which the whole appeal turns. Sub-sect. 1 of s. 10 provides that if a judgment for damages for personal injuries or death is obtained against a person insured by such a policy as is required by s. 36 of the Road Traffic Act, 1930, "then, notwithstanding that "the insurer may be entitled to avoid . . . . the policy, the "insurer shall, subject to the provisions of this section, pay "to the persons entitled to the benefit of the judgment" the damages, interest and costs awarded. This provision thus gives to plaintiffs, who obtain judgment in an action for damages caused by the negligent driving or management of a motor-car, a direct right of action against the insurance

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company who issued the policy required by the 1930 Act, although the plaintiffs in the negligence action are not parties to the policy, and in spite of the policy being voidable at the insurer's instance. From the extreme hardship that might otherwise result from sub-s. 1, sub-s. 3 gives the insurer a conditional means of escape. If he discovers that he was induced to make the contract of insurance by some material non-disclosure or misrepresentation which, by ordinary insurance law, and not merely by reason of some special stipulation which he has put in his form of policy, entitles him to avoid the contract, he may obtain a declaration to that effect from the Court; and will then be free of statutory liability to the injured third party. This legislation was obviously intended (inter alia) to effect a fair compromise between the two desirable but conflicting objects, on the one hand of protecting the public from the danger of impecunious tort-feasors on the roads, and, on the other hand, avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary burden of a policy which, neither in law nor equity, is his policy. But it would have been unfair to confer this relief unconditionally. There was an obvious danger of the injured party being deprived of the pecuniary safeguard which was the subject of sub-s. 1, through the possibility of the policy being avoided in proceedings under the first part of sub-s. 3 without his knowledge, and even by collusion between the insurer and the insured. It was essential, therefore, that he should have notice of any such action by the insurer, and also be given the right to appear in it and there defend his rights. Both requisites are met by the proviso to sub-s. 3, which in effect creates two conditions precedent to the existence of the insurer's right to a declaration under the first part of sub-s. 3. The third party receives full notice of the ground of the insurer's claim, and is given an unqualified right to become a party in the insurer's action; and it is particularly to be noted that he is given *all* the rights of a party to an action without any qualification upon them.

It is out of this statutory position that the disputes which led to the appeal arose. The relevant facts are few. The insured person was the respondent, Charles Hunt (see the definition in the policy). His son, John Hunt, a young man alleged to be under seventeen and a half years at the time, was on October 8, 1938, driving his father's car, with his father's permission, as he often did; and it was his negligence which was alleged to have caused the accident. Both the Thornes were injured. On October 31, 1938, a signed statement was obtained from John Hunt by a solicitor acting for the appellant company, in which he made statements affecting the truth of certain answers to questions in the proposal form signed by his father. The appellants at once raised the question of misrepresentation. On November 4, Charles Hunt called at the appellants' office and had an interview with the company's claims manager. The Hunts' solicitors wrote on November 5 denying the allegations; and by a letter of November 18, claimed on behalf of their clients to exercise an option in the policy to cancel it; to which the appellants replied challenging their right to do so. The parties were thus at arms' length, taking opposite views.

On July 17, 1939, the Thornes issued their writ against the Hunts. On October 17, 1939, the appellants' solicitors gave to the Thornes the statutory notice under s. 10, sub-s. 3, specifying the misrepresentations of fact alleged to be false in material particulars; and alleging also non-disclosure of the same material facts. On the same day the appellants issued their writ, just within the three months allowed.

Two declarations were asked for by the appellant company in the statement of claim: (*a*) That they are, and have, at all material times, been entitled to avoid the policy of insurance dated September 1, 1938, on the grounds that the said policy of insurance was obtained by the non-disclosure of material facts and/or by the representation of facts which were false in some material particulars; (*b*) That they are under no liability to indemnify the defendants Charles Hunt and John Hunt or either of them in respect of any damages or costs which may be awarded against them or either of them in the action brought against them by the said Percy Thorne

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and Matilda Thorne. The Thornes in due course gave notice that they desired to be made parties in the company's action; and at the instance of the plaintiffs they were, by order dated January 5, 1940, added as defendants, and the writ was accordingly amended.

The learned judge heard the case on August 30 and September 2, 1940; and gave judgment on September 3, 1940, holding that two representations had been made which were false in material particulars; and would have entitled the plaintiffs to their declaration, but for a particular clause in the policy upon which he gave judgment against them.

The form of policy was typical of the elaborate and overloaded documents used in motor-insurance at the present day, which few insured persons read, and still fewer understand; but it satisfied the requirements of s. 36 of the Road Traffic Act, 1930. It recited and incorporated the "proposal" and "declaration" of the assured, made them "the basis of "the contract" and incorporated them in the policy. It then granted the insurance, subject to the following provisos, which I quote in extenso, except for the reference to the Acts of Northern Ireland. "(*a*) That the truth of the statements and answers in the said proposal shall be conditions "precedent to any liability of the company to make any "payment under this policy; (*b*) That nothing in this policy "or in any endorsement thereon shall affect the right of any "person indemnified by this policy or of any other person to "recover an amount under or by virtue of the provisions of "the Road Traffic Act, 1930, s. 38; Road Traffic Act, 1934, "s. 10 and s. 12."

There followed after the provisos this clause: "But "the insured shall repay to the company all sums payable "by the company which the company would not have been "liable to pay but for the said provisions of the abovementioned Acts." The policy was for a year from September 1, 1938. Condition 1 called for immediate notice of an accident; condition 6 made the contract personal to the insured; and condition 8 was as follows: "The due

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"observance and fulfilment of the terms, provisions and "conditions of this policy, and of any endorsement thereon, "in so far as they relate to anything to be done or complied "with by the insured, and the truth of the statements and "answers in the said proposal, shall be conditions precedent "to any liability of the company to make any payment under "this policy."

The only misrepresentations established in the view of the learned judge were the answers to questions 7 (*d*) and 8 (*a*) in the proposal form: "7 (*d*) Have you or any "person, who to your knowledge will drive the car ever "been convicted of an offence in connection with a motor "vehicle or motor-cycle, or is any prosecution pending? "(A.) No." "8 (*a*) Will the car be driven by any person "under 21? (A.) No."

Although the learned judge has not found the answer "myself" to the question 7 (*a*) "Who will *usually* drive the "car?" false, he held that, at the time of making the declaration, Charles knew that his son John, whom he had taught to drive, would *often* drive it; and that his answer to 8 (*a*) was, therefore, false.

In regard to question 7 (*d*), it was alleged that John had been convicted of four driving offences; but of that fact his father when signing the declaration was said not to have been aware. The learned judge, however, following the views on construction expressed in the Scottish case of *Zurich General Accident and Liability Insurance Co., Ld.* v. *Livingston* (1), where a similar question arose for decision, held that the answer "No" imported an assertion by the father that he knew the fact to be as stated, i.e., that his son, who, he knew, would often drive the car, had never been convicted. I agree with the learned judge and with the Scottish judges in that construction.

But for the second of the two provisos on the face of the policy, which I have quoted, the learned judge would have given the plaintiffs their declaration under s. 10, sub-s. 3; but he held that the second proviso was ambiguous; and,

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(1) 1940 S. C. 406.

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therefore, must be construed against the plaintiffs who had caused it to be put into the contract; and that so interpreted, it was an express abandonment by the company of the right conferred upon it by sub-s. 3 to escape from the liability imposed upon it by sub-s. 1. He, therefore, refused the declaration, and gave judgment for the defendants.

The company appealed, submitting (inter alia) that the clause did not and could not bear any such meaning. Mr. Thesiger, for the two Hunts, did not expressly contend that it could, but answered with this argument. The duties of disclosing all, or of not misrepresenting any, material facts are not duties existing at common law or in equity outside the insurance contract; each of them is just an implied condition of the contract—a warranty in the insurance sense importing that full disclosure has been duly made, and that all the material representations inducing the contract were true; with the result that the breach of either condition prevents the contract from becoming effective, and entitles the aggrieved party to avoid it. Being an implied term it will, said counsel, necessarily be superseded by any express term covering the same ground as, or being inconsistent with, the implied term. The express conditions, contained in proviso (*a*) and condition 8 which I have already quoted, are those upon which he relied as superseding his implied conditions. The first answer to his argument is that whereas his implied conditions go to the avoidance of the whole contract, the two express conditions in the policy leave the contract standing, and only negative liability attaching for payments under it. But I am not satisfied that his argument is sound in principle. I realize that there are several reported cases in which learned judges have, in the course of their judgments, expressed an opinion that the duty of disclosure may be regarded as resting on an implied term, but I do not know of any case where the point has come up for actual decision. On principle, it seems plain that the equitable jurisdiction to avoid a contract for misrepresentation cannot rest on such a foundation; and I agree with what Luxmoore L.J. says about that in his judgment, which I have had an opportunity of reading.

Even the common law duty of disclosure I find difficult to explain fully on the theory of its resting only on an implied term of the contract. If it did, it would not arise until the contract had been made; and then its sole operation would be to unmake the contract.

Although the question has not been decided judicially, it is worthy of note that ss. 17 and 18 of the Marine Insurance Act, 1906, seem to treat the twin duties of disclosing all the material facts, and of misrepresenting none, as existing outside the contract, and not as mere implications inside the contract; for that Act was intended to be declaratory of the common law; and I see nothing in the language of these particular sections to justify interpreting them as being anything but declaratory.

The language of sub-s. 3 of s. 10 of the Road Traffic Act, 1934, also reads as if Parliament was there making the same assumption; for the declaration which the insurer is empowered to obtain is one which, "apart from any provision "contained in the policy, he is entitled to avoid it on the ground "that it was obtained by the non-disclosure of a material "fact, or by a representation of fact which was false in some "material particular." The language of the sub-section does not direct the insurer to rely on a condition implied in the contract which will prevent its operation. But for two reasons which I will now state, I do not think it is necessary in the present appeal actually to decide the legal question thus raised by Mr. Thesiger.

Mr. Pritt, who was appearing for the two Thornes, took the point that the learned judge, in admitting the signed statement by John Hunt, and the oral evidence given below of what Charles Hunt had said to the claims manager of the company at the interview on November 4, had acted on evidence of the falsity of Charles Hunt's answers 7 (*d*) and 8 (*a*), which was not admissible against the two Thornes. At the trial the Hunts were not called as witnesses, and there was no other proof than the above of the falsity of those answers. We were told that Mr. Pritt had objected to the admissibility of that evidence as against the Thornes, but that the learned judge had overruled the objection. Mr. Pritt submitted before us that as his clients were defendants they were entitled to all the rights of defendants; the more so, as they were or might be vitally interested in resisting the appellants' claim to a declaration.

Mr. Samuels, on whom we at once called for a reply to this argument, submitted that sub-s. 3 on its true interpretation contemplated that the only issue for trial in an insurer's action for a declaration would be that which arose between insurer and insured, the sole parties to the contract; that a declaration against the insured alone was intended; and that such a declaration was intended to be binding against all parties claiming under a judgment for damages for death or personal injuries obtained by them against the insured party to the contract or other persons coming within the indemnity provided by the terms of the policy. To our question why Parliament in the sub-section had given an absolute right to such third person to be made a party to the insured's action, Mr. Samuels was unable to give any reply which I was able to understand. In my opinion, the necessary implication of the word "party" in the sub-section is that he is entitled to be made a co-defendant under the Rules of the Supreme Court, Order XVI., and that he then acquires all the rights of a defendant. In the present case, the Thornes, on exercising that election, were made co-defendants at the instance of the plaintiff company. It follows that they were then entitled to insist on the case being properly proved against them, and to make all proper objections to the admissibility of evidence; and, as the plaintiffs' case was not so proved, they were entitled to judgment with costs. The appeal must, therefore, be dismissed with costs as against the Thornes.

The action being dismissed as against the Thornes, it would, I think, be an improper exercise of discretion on our part to grant the declaration against the Hunts, even if we had power to do so, on which I postpone forming any opinion until a case necessarily raising that question arises for decision.

The appeal will, therefore, though for reasons differing from those of the learned judge, be dismissed with costs as against the two Hunts as well as against the Thornes.

LUXMOORE L.J. [having stated the facts, as set out earlier in this report, continued :] In opening the appeal in this Court, Mr. Samuels, on behalf of the company, relied on the findings of the judge that the policy had been obtained by the two representations already mentioned, that each of such representations was a material representation, and was false; but he challenged the construction put by the learned judge on the material section of the Act and on the policy. Mr. Pritt, on behalf of the Thornes, claimed that the falsity of neither of the representations had been proved at the trial by evidence which was admissible as against the Thornes. It is agreed that the objection to the admissibility of the evidence which was adduced on behalf of the company was taken at the time when it was tendered and that the objection was overruled. Logically, this is the first point to be determined on the appeal.

It is difficult to understand how it could be held that the evidence of either witness was admissible against the Thornes. The Thornes were parties defendant to the action and were vitally interested in requiring that the falsity of the representations relied on by the company should be strictly proved. They were entitled to have the age of John Hunt proved, either by the production and identification of his birth certificate or by some person present at his birth, and to have any convictions against him proved by the production of proper certificates of such convictions.

It was argued, however, by Mr. Samuels on behalf of the company (and this argument was accepted by the learned judge), that although the Thornes were properly made defendants in the action, because the evidence in question was admissible as between the company and the Hunts, it was wholly immaterial to consider whether, if the proceedings had been simply against the Thornes, or concerned rights solely vested in them, the evidence would have been inadmissible against them. Obviously the Thornes are, by reason of the provisions of s. 10 of the Road Traffic Act, 1934, interested in resisting by any proper means the making of the first declaration sought. As defendants, they were, in my judgment, entitled to insist on strict proof of the facts on which alone the right to the declaration could be founded, and I fail to see any ground for holding that the Thornes' rights as defendants are in any way curtailed by anything in s. 10.

On the contrary, the form of the declaration, as stated in the section, namely, a declaration that the insurer is "entitled to avoid the contract" emphasizes the interest of the Thornes in the company's action, for, if that action had been against the Hunts alone on the ground that the policy was issued by the company by reason of false representations made by Charles Hunt, then the relief sought would not be a declaration in the form stated but a declaration that the contract was void and ought to be set aside and delivered up for cancellation, for, in such a case, the court would not make a declaration which would leave it to the company to decide whether it would avail itself of such a declaration or not.

I am satisfied that Mr. Pritt was entitled to object on behalf of the Thornes to the evidence tendered by the company in support of its claim to the first declaration on the ground that it was inadmissible as against his clients. That being so, whatever may be the proper construction of the material section and the policy, the action, so far as the Thornes were concerned, of necessity failed, because there was no admissible evidence to support the contention that the material representations, or either of them, were, or was, false.

It was argued that, in any event, the company was entitled to have the first declaration made as against the Hunts, even if it were expressed to have no operation as against the Thornes; but in my judgment this argument is also unsound. The question whether in any particular case a declaration shall be made in an action is in the discretion of the court. In the present case if the declaration has no force so far as the Thornes are concerned, it could serve no useful purpose to make it as against the Hunts, for the policy had expired before the company's action was instituted and there was at the date of the trial no possible claim under it in which any third party other than the Thornes could then or thereafter be interested.

It might be that if the company had asked the court to make the second declaration sought by its statement of claim it would have been proper for the court to make it, for such declaration arises out of the express terms of the policy, namely, that the truth of, among other statements, those contained in the answers to questions 7 (*d*) and 8 (*a*) in the proposal form (which the Hunts have, so far as they are concerned, admitted to be untrue) is a condition precedent to any liability of the company to make any payment under the policy to the Hunts by way of indemnity in respect of any judgment which might be obtained against them by the Thornes in the Thornes' action, and such declaration cannot affect anyone other than the Hunts.

But such a declaration would, in all probability, be purely academic, for, if the Thornes should recover judgment in their action against the Hunts, it is practically certain that the Thornes would proceed to enforce it against the company under the provisions of s. 10 of the Act of 1934 and would not trouble to attempt to enforce it against the Hunts or either of them. In any event, the Hunts have admitted that they would not, in the circumstances, be entitled to resist any claim by the company for repayment to it by the Hunts of any moneys paid to the Thornes under the said section.

Mr. Thesiger, on behalf of the Hunts, put forward an argument to which reference ought to be made, namely, that in no event could a declaration to the effect that the company was entitled to avoid the policy be made on a policy which contained, as this policy does, provisions to the effect that the truth of the statements contained in the answers to the questions in the proposal form was a condition precedent to the company's liability under the policy and the warranty already quoted from the declaration attached to the proposal.

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He said that the right of an insurer to avoid a policy of insurance for misrepresentation or non-disclosure with regard to a material fact was based in law on implied contract, and that the presence of the express provisions in the policy and declaration excluded any possibility of the implication referred to. He quoted a number of authorities, all of which related to cases of non-disclosure. Whatever may be the position with regard to non-disclosure, as to which I say nothing, I am satisfied that in a case of positive misrepresentation the right to avoid a contract, whether of insurance or not, depends not on any implied term of the contract but arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition. Further, the provision in this policy that the truth of the answers to the material questions in this policy is a condition precedent to the company's liability to the insurer is a warranty which confers a contractual right on the insurer and has no reference to the right to set aside the policy, whether for false representations or for non-disclosure. The same criticism applies to the warranty in the declaration. There is no express provision in the policy entitling the company to set the policy aside, whether for misrepresentation or non-disclosure.

As I have already stated, Stable J. held that the company, by the policy issued to Charles Hunt, expressly abandoned any right that it might otherwise have had to avoid the policy on the ground of misrepresentation. The learned judge came to this conclusion because of the presence in the policy of the provision that " nothing in this policy or in any endorsement "thereon shall affect the right of any person indemnified by this "policy or of any other person to recover an amount under or "by virtue of the provisions of," among other enactments, s. 10 of the Road Traffic Act, 1934. He said that the policy included the proposal form and declaration and the answers thereto, and that, consequently, he was bound to read the clause as if it said : "Nothing in the answers to any of the questions shall "prevent the Thornes in the event of their obtaining a judgment "against the Hunts in the Thornes' action as persons entitled "to recover an amount under or by virtue of the provisions of s. 10 of the Road Traffic Act, 1934, from recovering the "amount of any such judgment under the policy." Mr. Samuels contended that the learned judge's conclusion was incorrect, because any right conferred on the Thornes by reason of the presence in the policy of the clause to which the learned judge referred could only remain in existence if the contract were not avoided. If the company is entitled to avoid the contract by reason of the misrepresentations relied upon, and does so avoid it, the contract and everything in it would cease to have any effect. The section itself provides that the right to avoid the contract for misrepresentation exists "apart "from any provision contained in the policy." Mr. Samuels' argument seems to me to have considerable force, but, as no argument in support of the judgment was heard on this point, I do not think it right to express any concluded opinion on it. It is sufficient to say that, having regard to the conclusion at which I have arrived, on the question of admissibility of the evidence tendered by the company to establish the fact that the misrepresentations were made, I agree that this appeal fails and should be dismissed with costs.

DU PARCQ L.J. [judgment read by Luxmoore L.J.] I agree that this appeal should be dismissed. The Thornes were parties to the action. They were properly made defendants. An order cannot be made against a defendant, affecting his rights, except upon evidence or as a result of his admissions. The Thornes made no admissions. No evidence was adduced which was admissible against them. There was, therefore, no evidence before the learned judge on which he could have made an order against them, if he had been minded to do so. It may be that it would be open to this Court to grant a declaration against the Hunts; but I agree that, in the exercise of our discretion, we ought not to do so.

The other interesting questions which were debated at the Bar have been fully discussed in the judgments of my brethren, and it is unnecessary that I should express any opinions of my own about them.

Appeal dismissed.

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MERCHANTS AND MANUFACTURERS INSURANCE CO. v. CHARLES AND JOHN HUNT AND PERCY THORNE AND MATILDA THORNE.

Solicitors for the appellants: *Hewitt, Woollacott & Chown.*

Solicitors for the respondents, Charles and John Hunt: *R. I. Lewis & Co.*

Solicitors for the respondents, Percy and Matilda Thorne: *Silverman & Livermore.*

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Nov. 27, 28;
Dec. 4;
C. A.
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Feb. 26.

Negligence—Contractors to roof-in private passage—Work to be done to satisfaction of employers—Sole plate larger than base of pillar—Outer edge left eleven and a half inches from passage wall—Where passage narrowed dangerous to those using the passage—Work inspected and passed by employers—Ground not illuminated—Person with right to use passage tripped up by sole plate—Liability of contractors.

The defendants, contractors, who had agreed with the Corporation of the City of London to erect a roof ten feet five inches above the ground in a private court or passage, as a protection against "blast" and "shrapnel," to the satisfaction of the corporation, left a sole plate under an upright or pillar, consisting of nine-inch by three-inch board about eighteen inches to two feet long, lying flat, lengthwise, along the passage, with its outer edge eleven and a half inches from the passage wall, where the passage narrowed from six to four feet. No instructions were given to the defendants as to the details of the work, but on its completion it was inspected by a works supervisor of the corporation and passed. The passage, when roofed, was lighted by a blue-dulled electric light, which served to show the entrance to the premises of G. & W. at the end of the passage—a cul-de-sac—but this light, which was not under the control of the defendants, did not illuminate the ground in the passage. A little daylight filtered in on one side of the roof, but the passage was very dark by day.

The plaintiff, an employee of G. & W., who had a grant of a right for themselves and their employees to use the passage, on September 29, 1939, the second day on which he had used the covered passage, was groping his way out to the street at 5.30 P.M. when he tripped over the sole plate, which was not bevelled, fell and broke a bone in his left foot. The Court found that the sole plate in the position in which it was left was unnecessarily dangerous to those using the passage, lighted as it was when the work was done and left, and that the plaintiff was not guilty of contributory negligence:—

Held, by Atkinson J., that as the contract of the defendants was to do the work to the satisfaction of the corporation which had inspected and passed the work, there was an intervening conscious agency which might and should have prevented the mischief. The defendants, therefore, owed no duty to the plaintiff.

Held also, that the effective cause of the injury to the plaintiff was the inadequate lighting of the passage and for this the defendants were not responsible.

Donoghue v. *Stevenson* [1932] A. C. 562 applied.

Earl v. *Lubbock* [1905] 1 K. B. 253 considered.

Decision of Atkinson J. affirmed by the Court of Appeal on the facts.

ACTION claiming damages for negligence.

Reported by C. G. Moran, Esq., Barrister-at-Law.

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&
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Ld.

By his statement of claim, the plaintiff, who was a colour etcher, aged forty-six, employed by Gee & Watson, Ld., at 111, Shoe Lane, London, E.C., pleaded that on September 26, 1939, while lawfully walking along a passage-way at or near 111, Shoe Lane, he collided, by reason of the negligence of the defendants, with an obstruction erected in the passage-way by the defendants, whereby he sustained injuries.

The plaintiff gave the following particulars of negligence: (*a*) erecting in the passage-way an obstruction, to wit, a wooden prop; (*b*) erecting the prop in a position in the passage-way which was dangerous to persons using the passage-way; (*c*) erecting the prop in a position in which it projected into the passage-way; (*d*) failing to warn persons lawfully using the passage-way of the presence of the prop; (*e*) failing so to guard or fence the prop in such a way as would prevent persons lawfully using the passage-way from colliding with the prop; (*f*) failing to take any or any adequate precautions to protect persons lawfully using the passage-way from the danger of colliding with the prop; (*g*) failing adequately or at all to light the passage-way and/or the prop.

By their defence, the defendants denied negligence and pleaded that they owed no duty to the plaintiff. They also pleaded that if the plaintiff suffered injuries such injuries were caused solely, or in the alternative, contributed to, by the plaintiff's own negligence.

The facts proved were stated by Atkinson J., in his judgment, to be as follows: The plaintiff's employers were Gee & Watson, Ld., and the entrance to their place of business is at the end of a passage about twenty-six feet long, running out of Shoe Lane, Fleet Street, London. For about eight feet, the passage runs under the buildings in Shoe Lane and, before the war, the rest of the passage was the bottom of a well open to the sky and a slice of the well was railed off by iron railings about six feet high. The width of the passage under the buildings and for another ten feet along the part railed off is four feet wide; it then widens to six feet, so that for the last eight feet—the eight feet adjoining the entrance to Gee & Watson, Ld.'s place of business—the passage is six feet wide.

Standing with one's back to the door of Gee & Watson, Ld.'s premises on the left, there is then a straight wall to the street and immediately on the right of the entrance is the back entrance to the place of business of the Liverpool Post, and eight feet away from the door of Gee & Watson, Ld., the railings come down from the right hand wall a couple of feet and then run parallel to the wall opposite, right up to the beginning of the passage-way under the buildings. Gee & Watson, Ld., had a single electric light over their doorway which was not wanted by day, but was used by night, possibly a good deal, as they had workmen working there in three shifts. Very soon after the war began an A.R.P. warden took out the electric light and substituted a blue lamp heavily coated with some rubbery substance which gave just enough light to indicate to people coming along the passage where the entrance was, but it did nothing whatever in the way of illuminating the ground ahead of them.

After the outbreak of war, the corporation of the City of London were minded to have a public air raid shelter in the basement of the premises belonging to the Liverpool Post, and they wanted the entrance from the well to be a back-way into the shelter. The defendants are contractors, and they were instructed by the corporation of the City of London to board over the well at a height of ten feet five inches from the ground; the object was to protect people coming in and out of the shelter from "shrapnel" and "blast." No instructions were given to the defendants as to the details of the work, which were left to them. Along the Liverpool Post side of the wall, some ten feet up, there is a parapet on which one side of the roofing could rest, but on the other side of the well the roofing had to rest upon some structure to be erected for the purpose. The structure consisted of a beam some ten feet from the ground fulfilling the purpose of the parapet on the opposite side, and the beam rested on three strong uprights. One upright was close to Gee & Watson, Ld.'s doorway and was sheltered by a pier projecting from the wall of the lane; the next was eight feet away and the third was another eight feet further on, close up to where the passage began to run under the buildings. The centre upright was therefore just at the point where the six feet of passage was narrowed to four feet by the presence of the iron railings. Each upright rested on a sole plate, a piece of wood very much larger than the end of the upright. The upright was made of nine-inch by three-inch board and the outer edge of the sole plate, which was also a nine-inch by three-inch board lying flat on the ground, projected eleven and a half inches from the passage wall, so that in the middle of this sole plate there would be an upright occupying three inches of the width of the board resting on the ground. The length of the sole plate under the middle upright was about eighteen inches to two feet and the sole plate under the third upright was very much longer. On the parapet and the parallel beam opposite were placed joists across the passage-way and the roof boards were placed on the top of the joists. The result of the work was to turn what had been a perfectly well-lighted well into a very dark place.

The work begun by the defendants on September 17 was completed on Sunday, September 20, 1939. A works supervisor, in the employment of the London County Council, whose services had been lent to the corporation and whose duty it was to supervise and inspect and test structures of this sort, saw the work for a few moments on September 20 and inspected it and passed it on September 21, and he complained to Gee & Watson, Ld. about one or two sandbags in the passage. There were several layers of sandbags placed on top of the roof to strengthen it. His examination was very perfunctory; he was very busy and the place was very dark and he did not notice the sole plates, but he did examine the work and he did pass it. He remembers the blue light and that it was there on September 15 before the work began, and that it was there when he passed the work on September 21.

The plaintiff is a colour etcher, forty-six years of age, who has been employed by Gee & Watson, Ld., for many years. When war broke out, it was arranged between the firm and their employees that for six weeks the employees,

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or some of them, including the plaintiff, should work alternate weeks only. The plaintiff was away from September 20 to 27 and came back on Monday, the 28th, and of course he could not fail to see that an entrance, which had been well lighted the last time that he was there, was now dark and dimly lighted. He came to work in the morning and left work in the afternoon of the Monday, and on the Tuesday, September 29, he came in the morning and was leaving at about 5.30 in the afternoon, and while groping his way out, tripped over the end of the second sole plate and fell to the ground, breaking a bone in his foot.

I accept the plaintiff's evidence as to how the accident happened, and his evidence that the blue lamp was the only light and that it was of no use from an illuminating point of view and that it was quite impossible for him to see this sole plate sticking out, as indeed it did, eleven and a half inches from the wall. A number of sandbags have been placed since September 29, 1939, by Gee & Watson, Ld., to prevent a recurrence of the accident. Gee & Watson, Ld., have a long lease of their premises and they have a grant of right to themselves and their employees, and people having business with them, to use this passage-way, which is the only entrance to their premises.

Blanco White K.C. and *L. MacLaren* for the plaintiff: Statutory powers to do this work were neither pleaded nor proved, but assuming that the corporation of the City of London had such statutory powers then the work was carried out negligently and in breach of duty to those using the passage-way. The defendants left this sole plate in a position of danger to passers-by, just where the passage narrowed from six to four feet, and the sole plate was an obstruction and a nuisance in a private way. They left it there in the dark, for it was the defendants who had shut out the daylight by erecting the roof. The sole plate constituted "a trap" for those using the passage.

[ATKINSON J. If the passage had been adequately lighted with artificial light, would the sole plate then have been dangerous to those using the passage ?]

Perhaps not, but the defendants were responsible for leaving the sole plate in this position when they had shut out the daylight. The electric light bulb had been removed by the A.R.P. authorities and a blue-dulled bulb substituted. The defendants could and should have called the attention of Gee & Watson, Ld., to the state of the light, but they failed to do so. The defendants failed in their primary duty by leaving a dangerous obstruction in this private way when it was not lighted and there was no expectation that it would be lighted. On these facts the defendants are liable to the plaintiff in damages. *Corby* v. *Hill* (1) and *Clark* v. *Chambers* (2).

John Thompson (for *N. Richards*, on war service) for the defendants: The defendants owed no duty, in law, to the plaintiff. The defendants were not in occupation of the passage and the plaintiff was not their invitee.

Complaint is made that the defendants obstructed the passage-way, but that was the work which the corporation of the City of London employed the defendants to carry out. In supporting the roof by pillars, it was inevitable that they would obstruct the passage-way but the obstructions were obvious had the passage been properly lighted and there was no danger from the sole plate had the ground been adequately illuminated. When once the passage had been roofed in, the defendants were entitled to assume that those who invited persons into the passage-way would provide and maintain there adequate artificial light and there was no reason why, from the point of view of the Defence Regulations, this should not have been done by day. But the lighting of this passage was not the duty of the defendants: they had no control over the artificial lighting there. Further, there was no duty on the defendants to issue any warning to those using the passage. The defendants were not invitors. The defendants had finished their work in the passage. In accordance with the contract, it had been inspected and passed by the corporation. There was not only a probability or possibility that the work would be examined and tested, there was a certainty, for it was a provision of the contract between the defendants and the corporation that the work should be done to the satisfaction of the corporation. The work was inspected and passed by the corporation. No duty therefore remained on the defendants to the plaintiff under the principle laid down in *Donoghue* v. *Stevenson* (1), if that case, having regard to *Otto* v. *Bolton and Norris* (2), has any application to realty.

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(1) (1858) 4 C. B. (N. S.) 556.

(2) (1878) 3 Q. B. D. 327.

Again, liability under the principle laid down in *Donoghue* v. *Stevenson* (1) is only applicable where the producer has the sole opportunity of knowing and recognizing the danger. Here the plaintiff had an equal opportunity of appreciating any danger. A person who passes through a dark and unilluminated passage-way without a torch or light has only himself to blame for any injury he receives from collision. The plaintiff's injury was caused or contributed to by his own negligence.

Blanco White K.C. in reply. The plaintiff was not guilty of contributory or of any negligence. There was no apparent danger and no obvious risk.

The fact that the defendants were fulfilling the terms of a contract with the corporation of the City of London, a body having no rights in the land of the passage, gave the defendants no authority to erect a dangerous obstruction in a private way. *Donoghue* v. *Stevenson* (1) is not here in point and the principle there laid down by the House of Lords is inapplicable, because the cause of action here differs from that pleaded in *Donoghue's* case (1). The cause of action here is for negligently placing an obstruction in a private way and the defendants' liability is the same as if they had placed the obstruction in a public way.

Kimber v. *Gas Light and Coke Co.* (3) and *Milner* v. *Smith* (4) were also referred to.

1940. Dec. 4. ATKINSON J. [after stating the facts as already set out, continued :] The plaintiff's case is that the defendants placed a dangerous trap in a pathway which he had the right to use—a way which, of necessity, was dark—and that in such a place just where the passage-way narrows

(1) [1932] A. C. 562.
(2) [1936] 2 K. B. 46.
(3) [1918] 1 K. B. 439.
(4) (1814) 2 Dow, 390.

from six feet to four feet and where there would be a tendency for pedestrians to keep to the left, to put this eleven and a half inch projection, three inches high, was a thoughtless and dangerous act. It was said that there were many ways of making and leaving the work reasonably safe. For instance, by making a continuous sole plate, or a sole plate with a bevelled edge, so that your toe would not have these three inches of board to catch against: or a coat of white paint or something to direct or catch the eye, would have been a fair warning. I agree with the plaintiff as to this. I have viewed the passage twice and I think that this obstruction was unnecessarily dangerous for people using the passage-way, with the light as it was when the work began and when the work was finished and left. Further, I find that the plaintiff was not guilty of contributory negligence; he had to use the passage; there was no other way. There was no obvious danger and there was no obvious risk which it was foolish for him to incur.

The defendants' answer to the claim is that they were under no duty in law to the plaintiff; that they knew their work had to be inspected before it would be passed by the corporation, and, therefore, that as against the plaintiff they could not be guilty of negligence because when once their work was finished, inspected and passed, they owed him no duty. They further say that when once their work was finished they had no control of the lighting and, of course, there would be no possibility then of their warning anybody coming along the passage of the dangers ahead.

The plaintiff was no party to the contract under which the work was done. It was assumed that the corporation had some statutory power to order this work to be done; it was not suggested that they were wrongdoers. No one can pretend that there is any certainty as to when a duty of care is owed by a contractor to someone who is not a party to the contract. Discussion usually begins with a consideration of *Earl* v. *Lubbock* (1), where an action was brought for damages for

(1) [1905] 1 K. B. 253.

personal injuries sustained by a carter who was in the employ of a firm owning a number of vans. The defendant was a master wheelwright who had entered into a contract with the plaintiff's employers to keep the vans in good and substantial repair. He used to send men to the employers' premises to examine the vans. One day a wheel came off from one of the vans and the plaintiff was injured—it was a wheel on which the defendant's workmen had done work. The plaintiff brought his action against the contractor saying that the workmen had done their work negligently and in that way caused his injury, but he lost his action on the ground, according to Stirling L.J., that he did not bring evidence to show that to the knowledge of the defendant the van was "in such a condition as to cause danger, "not necessarily incident to the use . . . . of such a thing." It is not very clear how far Sir Richard Henn Collins M.R. agreed with him, but he quoted at length the judgment of Parke B. in *Longmeid* v. *Holliday* (1), which was much to the same effect. Certainly Scrutton L.J. thought that this was the effect of the case, for in *Hodge & Sons* v. *Anglo-American Oil Co. and D. T. Miller & Co.*, he said (2): "For it seems to me as regards "an article safe if properly constructed or repaired, but "dangerous because of negligent construction or repair, where "the defendant does not know of the danger, we are bound "by *Earl* v. *Lubbock* (3), to hold the defendant is not liable "to persons with whom he has no contract for damage caused "by the dangerous article." That certainly was the effect of the judgment of Stirling L.J. and what Scrutton L.J. thought was the effect of the judgment of Sir Richard Henn Collins M.R. in *Earl* v. *Lubbock* (3), but Lord Atkin, and Lord Macmillan, in *Donoghue* v. *Stevenson* (4) took the view that both the judgment of the Master of the Rolls and that of Mathew L.J. in *Earl* v. *Lubbock* (3) proceeded on the basis that the only duty alleged arose from the breach of contract, and that all the decision did was to confirm the undoubted law that if A. is injured as a result of breach of contract made between B. and C., A. cannot rely on that

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(1) (1851) 6 Ex. 761, 767.
(2) (1922) 12 Ll. L. Rep. 183, 187.
(3) [1905] 1 K. B. 253.
(4) [1932] A. C. 562.

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breach of contract as founding an action for damages. If that is the only effect of the decision it ceases to be of much interest. Lord Atkin said (1): "Stirling L.J., it is true, said "that to succeed the plaintiff must bring his case within the "proposition of the majority in *Heaven* v. *Pender* (2), that "any one who, without due warning, supplies to others for "use an instrument which to his knowledge is in such a "condition as to cause danger is liable for injury. I venture "to think that the Lord Justice is mistakenly treating a "proposition which applies one test of a duty as though it "afforded the only criterion." A further test which is well known is laid down in *Donoghue* v. *Stevenson* (3), and the test there laid down is, one most helpful in deciding this case. The principle is, perhaps, best taken from the passage cited by Lord Macmillan from the judgment of Cardozo J. in an American case, *MacPherson* v. *Buick Motor Co.* (4), as follows (5): "There is no claim that the defendant knew of the defect "and wilfully concealed it .... The charge is one, not of fraud, "but of negligence. The question to be determined is whether "the defendant owed a duty of care and vigilance to anyone but "the immediate purchaser. . . . The principle of *Thomas* v. "*Winchester* (6) is not limited to poisons, explosives, and things of "like nature, to things which in their normal operation are "implements of destruction. If the nature of a thing is such "that it is reasonably certain to place life and limb in peril "when negligently made, it is then a thing of danger. Its "nature gives warning of the consequences to be expected. "If to the element of danger there is added knowledge that "the thing will be used by persons other than the purchaser "and used without new tests, then, irrespective of contract, "the manufacturer of this thing of danger is under a duty to "make it carefully." If a contractor knows that his work, if negligently done, may expose others besides his contracting party to danger, and that it will be used without intermediate examination or test, he is under a duty to those persons.

(1) [1932] A. C. 562, 592.
(2) [1883) 11 Q. B. D. 503.
(3) [1932] A. C. 562.
(4) (1916) 217 N. Y. 382, 385.
(5) [1932] A. C. 562, 617.
(6) (1852) 6 N. Y. 397.

That principle was applied in *Malfroot* v. *Noxal, Ld.* (1). In that case there were two plaintiffs, a husband and wife; the male plaintiff owned a motor cycle and he had employed the defendant to fit a sidecar to it; within a day or two of the work having been done, while he was driving the combination, with the female plaintiff as a passenger in the sidecar, the sidecar broke loose and they were both injured. The male plaintiff won on his contract and Lewis J. held that the female plaintiff was also entitled to succeed and he so decided on the strength of that passage which I have read from Lord Macmillan's judgment in *Donoghue* v. *Stevenson* (2) saying that in his view the sidecar had been negligently fitted and was to be used without further tests.

If *Earl* v. *Lubbock* (3) were being tried to-day and the case were properly pleaded and based on negligence, instead of on breach of contract, I imagine it would be held that the defendant knew perfectly well that there would be no intermediate examination of the vans which he was supposed to have overhauled, and that he would be held liable—always supposing negligence were proved.

There is an interesting note in Beven on Negligence, 4th ed., at pp. 45–46, on the case of *Heaven* v. *Pender* (4), and it will be remembered that this was written long before the date of the decisions in *Donoghue* v. *Stevenson* (2) and *Grant* v. *Australian Knitting Mills, Ld.* (5). *Heaven* v. *Pender* (4) was the case in which a dock-owner had supplied staging for the use of painters employed by ship-owners to paint their ships in the docks, and owing to insufficient care and examination of the ropes on one of these stagings, they had rotted and broke while the plaintiff was working on the staging. He was injured and sued the dock-owner for damages and recovered. The passage in Beven on Negligence runs as follows: It "is submitted that the principle underlying the decision "in *Heaven* v. *Pender* (4) is, that the dock-owner, having "undertaken to supply the staging, thereupon undertook

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(1) (1935) 51 Times L. R. 551.
(2) [1932] A. C. 562.
(3) [1905] 1 K. B. 253.
(4) 11 Q. B. D. 503.
(5) [1936] A. C. 85.

"the obligation to supply a fit staging, which obligation "the plaintiff was justified in assuming he would discharge. "Had there been a duty on the ship-owner or on the ship-"painter to examine the staging, the chain of connection "between the plaintiff and the dock-owner would have been "broken. The decision must, therefore, be taken to imply "that there was no duty on the part of anyone, subsequent "to the dock-owner, to test the staging supplied; but that, "when the dock-owner undertook to supply staging, there "was an obligation that the staging supplied should be "reasonably fit for the purpose for which it was to be used, "so that those coming to use it might trust to the performance "of the dock owner's duty without any independent examina-"tion of their own. The difficulty of the case is to determine "between those cases where the obligation to inquire arises, "and those cases where there is no such obligation. The "presence or absence of this obligation, in each case, marks the "intervention of that new conscious agency or its absence which "discriminates whether the right of action exists in the original "negligent person or is diverted." As I have said, that was written before *Donoghue* v. *Stevenson* (1) and *Grant* v. *Australian Knitting Mills, Ld.* (2), were decided, cases which have finally established the vital importance of the possibility and probability of intermediate examination of a manufacturer's goods or of a contractor's work in considering the nexus between the manufacturer and the consumer or between the contractor and a third party injured by his negligence.

In *Farr* v. *Butters Brothers & Co.* (3) Greer L.J., in two sentences, put the principle in a nutshell. He said: "As "I read the judgment of the House of Lords, the fact that in "that case the defect was not discoverable by such a reasonable examination as ought to be anticipated distinguishes "the case from this one. Here the chain is broken between "the manufacturer and the person using the article sold, and "it is impossible to say in law that the manufacturer has "committed a breach of any duty which he owed to the user

(1) [1932] A. C. 562.

(2) [1936] A. C. 85.

(3) [1932] 2 K. B. 606, 619.

"of the article." He continued (1): "That is the principle "on which he [Lord Atkin in *Donoghue's* case (2)] based "his judgment. I understand him to mean that if the "manufacturer had left a reasonable possibility of examination, either through an intermediate person or by its use, "there would be no liability, because there would be no duty." I rather think the word "probability" ought to be substituted for the word "possibility," in view of the words used by Greer L.J. in the previous passage. That seems to me to have a close bearing upon the principle dealt with in Beven on Negligence, 4th ed., on p. 44 et seq., where is expounded the principle that liability attaches only to the last conscious agent. "The principle that to fix liability for injuries brought about "through a complicated state of facts, the last conscious agency "must be sought; and the consideration that if, between the "agency setting at work the mischief and the actual mischief "done, there intervenes a conscious agency, which might or "should have averted mischief, the original wrongdoer ceases "to be liable, afford the clues for unravelling the cases. On the "other hand, it must be borne in mind that, though there may "intervene various stages in the development of the mischief, "yet, if none of these is due to a conscious volition, the last "conscious agent continues to be liable." I find that principle was considered by Lawrence J., in *Brown* v. *T. & E. C. Cotterill* (3). In that case the plaintiff was a child who was wandering about a churchyard and was injured by the falling of a tombstone which had been erected some three or four years before by the defendants, it was proved that it had been negligently and inefficiently erected, and the question arose whether the child, who was a complete stranger to the contract under which the tombstone was erected, had any right of action against the defendants who had erected the tombstone. Lawrence J., having referred to *Donoghue* v. *Stevenson* (2), said: "The cases collected in Beven on Negligence (4th ed., at "p. 44 et seq.) are, in my opinion, to be explained by the "application of the above test—namely: Are the terms of the

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(1) [1932] 2 K. B. 606, 620.
(2) [1932] A. C. 562.
(3) (1934) 51 Times L. R. 21.

"contract such that an ordinarily prudent person would "consider that his liability was at an end after the approval of "the other party to the contract?" (1). He dealt with the facts of that case from which it appeared that the monumental mason held himself out as an expert on the erection of tombstones and that those who employed him had no knowledge of his art and the methods of erection and held that, as there could not be and would not be any examination or test of the mason's work, as he would know perfectly well, the plaintiff was entitled to recover. He then went on to say (2): "These facts appear "to me to create a duty in the defendants to every member of "the public who might lawfully enter the churchyard and "be injured by the fall of the tombstone. The contract "between the defendants and the persons who paid for the "tombstone is irrelevant unless it were to be held, which I "do not hold, that such persons were bound to examine and "approve of the method of erection, in which case it might be "said that the defendants would not be liable. As I have said, "persons who employ monumental masons to erect tomb-"stones rely on the mason's skill and not on their own "examination, and there is, therefore, nothing in their "acceptance of the mason's work to exempt him from liability "for the defective work which he has erected in a place to "which the public have access."

If I apply to the case before me the test which is suggested in Beven on Negligence (4th ed., at pp. 44 to 46) and was applied by Lawrence J., in *Brown* v. *T. & E. C. Cotterill* (1), or the test laid down in *Donoghue* v. *Stevenson* (3) and enunciated by Greer L.J., in the passages I have read from *Farr* v. *Butters Brothers & Co.* (4) it seems to me that the plaintiff must fail in this case. The defendants' contractual obligation was to do the work to the satisfaction of the corporation. The defendants knew that there would be an expert inspection of their work and that they would not be able to discharge their contractual obligation until after that examination. There was an examination and their work was passed. It may very

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(1) 51 Times L. R. 21.

(2) Ibid. 22.

(3) [1932] A. C. 562.

(4) [1932] 2 K. B. 606, 619, 620.

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well be said that the inspection was perfunctory and hurried, but none the less there was an intervening conscious agency which might and should have averted the mischief. I think that the defendants were well entitled to take it for granted that when once their work had been examined and passed by people competent to examine it, their responsibility would cease.

There is, however, another difficulty in the way of the plaintiff in this case. Why was the work dangerous? Because of the darkness of the passage and the absence of warning. The defendants were not responsible for the continuance of the darkness; there was nothing to prevent any amount of lighting by day, and I think something a good deal better than the blue light could have been properly used at night after the erection of the roofing. At any rate, Gee & Watson, Ld., had ample opportunity before September 29 to appreciate the inadequacy of the lighting of the passage and the danger of the passage-way, which they were inviting people to use. It was at least their duty towards invitees to warn them of dangers of which they knew or ought to have known, and no duty to warn those using the passage-way could possibly rest upon the defendants when once their work had been finished, passed and handed over. After the accident, sandbags were placed along the bottom of the structure to prevent people from tripping over it, but it seems to me that here there was a second intervening conscious agency which failed in its duty—an agency which was responsible for the inadequate lighting and the absence of warning at the time of the accident.

The plaintiff relied on three cases, namely, *Corby* v. *Hill* (1), *Kimber* v. *Gas Light and Coke Co.* (2), and *Clark* v. *Chambers* (3). In *Corby* v. *Hill* (1) the plaintiff was driving along a private carriageway and was injured by coming into contact with a pile of refuse or rubbish which had been left there by the defendant. The defendant had permission of the owner to do certain building work and to place refuse on this carriageway and the plaintiff was injured because he could not see it; it was unlighted and he successfully brought his action. That case would be very relevant here if this accident had happened whilst the work was being done by the defendants and while they were still in control, but it seems to me to have no bearing upon this case.

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(1) 4 C. B. (N. S.) 556.
(2) [1918] 1 K. B. 439.
(3) 3 Q. B. D. 327.

The decision in *Kimber* v. *Gas Light and Coke Co.* (1) is really dead against this plaintiff's contention. There, the defendants were carrying out some work upon an empty house and had taken up a board in one of the upper rooms. The plaintiff, a lady who had high heeled shoes, came along to view the house while the defendants' men were there; they said it was all right, she could go upstairs, but never warned her of the trap which had been created by the removal of the plank; she recovered against the defendants on the ground that they had been negligent in not warning her. If their work had been approved by the owner and they had gone away and left the house and the accident had happened two days thereafter, it seems to me to be impossible to suggest that they would have been under any liability. In *Clark* v. *Chambers* (2) the defendant had unlawfully placed a dangerous obstruction, namely, a barrier with spikes sticking out, across a public way and a person who wished to use the carriageway picked up the barrier and put it on the footpath. The plaintiff, coming along in the dark, tripped over the path and was injured by the spikes and he sued the person who had put the barrier on the highway. It was argued that he could not recover on the ground that someone had removed the barrier from the roadway, but it was held that the defendant remained liable because it was just the sort of thing which he ought to have anticipated would happen; he had created an unlawful obstruction which any person coming along was entitled to remove and he ought to have anticipated that it might, and very likely would, be put in a place where it would be dangerous.

Giving the best consideration I can to all the arguments on behalf of the plaintiff, I am satisfied that this claim fails and there must be judgment for the defendants.

(1) [1918] 1 K. B. 439.

(2) 3 Q. B. D. 327.

The plaintiff appealed. The appeal was heard on February 26, 1941.

White K.C. and *MacLaren* for the appellant.

John Thompson (for *N. Richards*, on war service) for the respondents.

1941. Feb. 26. SIR WILFRID GREENE M.R. Goddard L.J. will deliver the first judgment.

GODDARD L.J. [having stated the facts and the findings of Atkinson J. :] The learned judge found that the proximate cause of the accident was the lack of lighting in the passage. In this narrow way the sole plate constituted an obstruction against which anyone might run in the dark. This action is brought against the contractors, and it has been argued that, as they were doing the work, they must have known that people would pass to and fro, and that, therefore, they should have left the place in a reasonably safe condition.

We might have had to consider the many authorities bearing on this point which were cited to us, but there is a finding of fact that the place was dangerous because of the lack of lighting. A convenient statement of the law relating to the liability of contractors is contained in the judgment of Lawrence J. in *Brown* v. *T. & E. C. Cotterill* (1) : " The cases "collected in Beven on Negligence (4th ed., p. 44 and following) "are, in my opinion, to be explained by the application of the "above test—namely : Are the terms of the contract such that "an ordinarily prudent person would consider that his liability "was at an end after the approval of the other party to the "contract ? "

This work had been inspected and accepted by a works supervisor employed by the City of London Corporation. The question is whether, considering that the effect of the work which the contractors were employed to do was to turn a well lighted passage into a dark passage, they should have assumed that the people having control of it would leave it dark. It was a danger because those people did not put a light there. If there had been a light, there would have been no danger. It cannot be said in the circumstances that the contractors laid a trap for the unwary. They had done the work which they had been called on to do and which had been accepted. As this passage was to be used as the entrance to an air raid shelter they were entitled to assume that it would be lighted. There being no invitation on their part to people to wander down a dark passage, did they owe a duty to the invitees of Gee & Watson, Ld.? That depends on the circumstances of the particular case. In my opinion, they were entitled to assume that, as the effect of the work was to turn a light passage into a dark one, the persons in control of it would light it.

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(1) 51 Times L. R. 21.

In the circumstances I think that the judgment of Atkinson J. was right and that the reasons which he gave were right since the work had been accepted and passed. In the case of a danger concealed from the occupiers of premises and their licensees, for instance, in the case of a balcony which a builder has been employed to repair, the fact that the work had been approved would not exonerate the contractor if it were badly done, the defect not being apparent. But here the persons employing the defendants could see how the work was done and they approved it. It was no part of the defendants' duty to provide lighting and they were entitled to assume that it would be provided. The appeal should be dismissed.

Sir Wilfrid Greene M.R. I agree. The whole circumstances of this case are such that proper lighting of the passage was obviously called for and that the contractors were entitled to assume that such lighting would be provided by the persons interested. If the appellant's counsel were right in their contentions no contractor could safely put up an erection in a dark passage save on an express undertaking by the owners of the premises to provide proper lighting.

du Parcq L.J. I agree. I hope that it will not be thought that we are laying down a new principle of law. This is a

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question of fact, and, if the action had been tried by a jury, in my opinion, there would have been a case to go to them. The question for them would have been whether the contractors were entitled to assume that adequate lighting would be provided by the persons concerned or should have foreseen that probably nothing would be done. In my opinion, Atkinson J. was entitled on the evidence to answer that question, as, in effect, he did, in the defendants' favour.

Appeal dismissed.

Solicitors for plaintiff: *Clement Daniels & Co.*

Solicitors for defendants: *Mackrell, Maton, Godlee & Quincey.*

F. C.

1940
Nov. 28, 29;
Dec. 10.

J. WHARTON (SHIPPING), LIMITED *v.* MORTLEMAN AND OTHERS.

Shipping—Requisition—Merchant ship requisitioned by Admiralty—Collision on way to receive orders—Intention to give orders to undertake warlike operation—Warlike operation.

The plaintiffs' vessel B. was sunk in collision with the A. The A. was an ordinary merchant vessel which had been requisitioned by the Government, who intended that she should be given orders to undertake a warlike operation. At the time of the collision the A. was on her way to S., where she was to receive those orders. The intention of the Government was not known to the master of the A.:—

Held, that the A. was not engaged on a warlike operation. *Liverpool and London War Risks Insurance Association* v. *Marine Underwriters of S.S. Richard de Larrinaga* [1921] 2 A. C. 141, distinguished.

ACTION tried by Lord Caldecote C.J.

The plaintiffs, J. Wharton (Shipping), Ld., owners of the motor vessel *Brendonia*, which had been sunk in collision with the steamship *Alderpool*, brought this action against the defendant Mortleman, a Lloyd's underwriter, for a total loss by perils of the sea under a policy of marine insurance. The defendant (inter alia) alleged that at the time of the collision the steamship *Alderpool* was engaged upon a warlike operation and that the loss was in respect of not a marine but a war risk. Thereupon the plaintiffs amended their writ and points of claim and claimed alternatively against the other defendants, Lloyd's underwriters, under a war risks policy of insurance.

Mortleman's policy contained a clause, being clause 20 of the Institute Time Clauses, 1938: "Warranted free of capture "seizure arrest . . . . or detainment, and the consequences "thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations." The *Brendonia* was also insured with the other defendants under a war risks policy covering "the consequences of hostilities or warlike "operations by or against the King's enemies."

In the early morning of September 11, 1939, the *Brendonia* was at anchor in the Downs and was struck by the *Alderpool*, steaming without lights, and sunk. The *Alderpool*, an ordinary merchant vessel, had been requisitioned by His Majesty's Government, who intended to employ her on her arrival at Southampton to transport army vehicles and petrol to Brest. This would be a warlike operation. At the time of the collision she was on her way from the Tyne to Southampton, where she was to receive orders. At that time the master of the *Alderpool* was not informed of the intentions of the Government. The Lord Chief Justice held that no blame was to be attributed to the *Brendonia.*

A. J. Hodgson for the plaintiffs. Prima facie the plaintiffs are entitled to recover against Mortleman as on a loss from perils of the sea. That defendant can only escape liability if he can show that the loss was caused by a warlike operation, in which case the other defendants will be liable. The plaintiffs are entitled to recover against one or the other.

Sir Robert Aske K.C. and *Waldo Porges* for the defendant Mortleman. The loss was caused by a warlike operation, and the fact that the warlike operation was negligently conducted —if in fact it was—is immaterial: *Board of Trade* v. *Hain Steamship Co., Ld.* (1); *Attorney-General* v. *Adelaide Steamship Co., Ld.* (2). No doubt, if it can be shown that the *Brendonia* was to blame, the plaintiffs' claim must fail: *Clan Line Steamers* v. *Board of Trade* (3); but it is clear on the evidence that she was not. Therefore, the sole question is whether at the time the *Alderpool* was engaged in a warlike operation. It seems clear that the mere sailing without lights is not in itself a warlike operation—so held in *Britain Steamship Co.* v. *The King* (4), notwithstanding the admission by the Attorney-General in *British and Foreign Steamship Co., Ld.* v. *The King* (*The St. Oswald*) (5). [*Attorney-General* v. *Ard Coasters, Ld.* (6) was also referred to.] But the *Alderpool* was on her way to take part in what admittedly would be a warlike operation; therefore she was engaged in a warlike operation: *Steamship Richard de Larrinaga* v. *Admiralty Commissioners* (7).

(1) [1929] A. C. 534.
(2) [1923] A. C. 292.
(3) [1929] A. C. 514.
(4) [1921] 1 A. C. 99.
(5) [1918] 2 K. B. 879, 883.
(6) [1921] 2 A. C. 141, 147.
(7) [1920] 1 K. B. 700, 705.

Bailhache J. had said in that case (1): "I think that when one of "His Majesty's ships is proceeding to her station to take up her "duties as a convoying ship she is engaged on a warlike "operation." Lord Wrenbury in the House of Lords said (2): "I think that [warlike] operation began when she took up the "duty of going to the place where she was to do that act."

A. T. Miller K.C. and *Patrick Devlin* for the second defendants. This was a marine not a war risk. The Admiralty might have altered their minds on the arrival of the *Alderpool* at Southampton, and until the orders were received she was an ordinary merchant vessel. The test to apply is to ascertain the state of mind of the master at the time of the collision and his answer to the question "On what "service is your ship engaged." Admittedly he did not know the intentions of the Government, and until he became aware of war orders—or at least had received them—his ship was not engaged in a warlike operation. All the cases cited deal with the operations of warships to which different considerations apply. The *Alderpool* was not on her way to transport army vehicles but to receive orders.

In *Attorney-General* v. *Ard Coasters, Ld.*, Lord Wrenbury said (3): "I do not think it is enough to say that the ship was a "warship and was proceeding under orders given by naval "authority." That is still more true of a merchant ship.

The collision was caused by the *Brendonia* failing to show sidelights.

Sir Robert Aske K.C. in reply. There is no authority for the proposition that the test is the knowledge of the master. The question what is a warlike operation is one of fact, quite independent of knowledge. No doubt every cargo-laden merchant ship may in wartime be said to be engaged on a peaceful manœuvre for she is anxious not to meet a fighting enemy, but by the terms of the requisition here the *Alderpool* was engaged in a warlike operation.

Cur. adv. vult.

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(1) [1920] 1 K. B. 705-706.

(2) [1921] 2 A. C. 141, 157.

(3) [1921] 2 A. C. 141, 156.

1940. Dec. 10. LORD CALDECOTE C.J. read the following judgment: This case raises once more a question concerning the incidence of risks as between marine and war-risk underwriters, in respect of a ship requisitioned by the Government. The plaintiffs, the owners of the motor vessel *Brendonia*, brought their action against the first-named defendant for a total loss by perils of the sea under a policy of marine insurance. The first-named defendant by his points of defence admitted the total loss of the *Brendonia* while denying that she was lost by any perils insured against. He alleged that it was caused or contributed to by the negligent navigation of the *Alderpool*, and further that the *Alderpool* was engaged upon a warlike operation and the loss of the *Brendonia* was not a marine risk but was a war risk. Thereupon the plaintiff amended his writ and points of claim, and claimed alternatively against the second-named defendants for a total loss under a war risks policy of insurance.

The *Brendonia* was at the time of her loss insured with the first-named defendant and other underwriters at Lloyds against the ordinary marine perils under a policy which contained the following clause being clause 20 of what are known as the Institute Time Clauses, 1938: "Warranted free of capture "seizure arrest . . . . or detainment, and the consequences "thereof or of any attempt thereat; also from the con-"sequences of hostilities or warlike operations." She was also insured at the same time with the second defendant under a war risks policy covering "the consequences of hostilities or "warlike operations by or against the King's enemies." The interest of the plaintiffs was admitted by both defendants.

On September 11, 1939, the *Brendonia*, which in the course of a voyage down the East Coast had come to anchor in the Downs near the Gull Buoy, was struck by the steamship *Alderpool* and sunk. The *Alderpool* had been requisitioned by His Majesty's Government on September 3, under charter T 99 and ordered to go to Southampton for orders. On the night of the collision she was proceeding from the Tyne to Southampton. It was the intention of the Government to employ her after arrival at Southampton in transporting army vehicles and petrol to Brest, where personnel were waiting to man the vehicles. The master of the *Alderpool* was not aware of the purpose for which she was to be used. At about 3.15 in the morning of September 11, she was steaming at slow speed without lights and working up to an anchorage close to the North Goodwin Buoy, which was rather more than a mile distant from the Gull Buoy, when she collided with the *Brendonia*, then at anchor.

[His Lordship then reviewed the evidence relating to the collision and found that the *Brendonia* was free from all blame, and proceeded:] The first question that arises for my decision is whether the *Alderpool* was engaged in a warlike operation when she collided with the *Brendonia*. The *Brendonia* plainly was not so engaged. If this question were to be considered apart from authority, it might seem a little startling to suggest that the *Alderpool* was at the time of the collision engaged in a warlike operation. She was not carrying war personnel or war material. She was not a combatant unit nor was she performing any of the duties of a warship such as patrol or the search for enemy ships or aircraft. She was proceeding to Southampton as an ordinary merchant ship, except for the fact that she was steaming without lights. Further, at the time of the collision she was making her way at a slow speed to work up to an anchorage in the Downs. The facts, however, including the fact that she was going to Southampton for orders which would result in her use as a ship to carry war material to Brest, must be considered in the light of a number of relevant decisions, many of them in the House of Lords.

It is possible at once to dispose of any suggestion that the fact that the *Alderpool* was carrying no lights justifies a finding that she was conducting a warlike operation. In the *St. Oswald* case (*British and Foreign Steamship Co., Ld.* v. *The King*) (1) the Attorney-General did not dispute that the sailing without lights was a military operation and it seems to have been on the basis of this admission that the Court of Appeal held that the collision in that case was caused by a

(1) [1918] 2 K. B. 879.

war risk. Later decisions, however, have made it plain that though steaming without lights and at full speed may be and often is material in arriving at the cause of a loss, it is not a ground on which, at any rate if it is the only ground, it can be said that there was a warlike operation: see *The Matiana* case, *Britain Steamship Co.* v. *The King* (1) and *Attorney-General* v. *Ard Coasters, Ld.* (2). The first-named defendant indeed did not contend otherwise. The case presented on his behalf was that inasmuch as the *Alderpool* was on her way to a port for orders and that it was intended when she arrived to use her for a purpose which would constitute a warlike operation, she was just as much engaged in a warlike operation before she reached the port as she would be after she had taken on board war material for carriage to Brest. I am ready to assume that Brest was a war base, that is to say a place from which reinforcements or supplies were provided for an army in the field or a place where troops or war material were assembled for the purpose of actual operations in the field. If it was necessary for the purposes of this case to decide that Brest was a war base at all material times, I should so hold. I think it would be pedantic to say that evidence must be given to prove so notorious a fact though I have not forgotten nor, I think, transgressed what was said in the House of Lords in the case of *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (3) as to the limits of judicial notice.

Assuming therefore Brest to have been a war base and accepting as I do Sir Robert Aske's submission that when the *Alderpool* was engaged in carrying war material to Brest, she would be engaged in a warlike operation, I am invited to carry the matter a step further. I am asked to say that the voyage from the Tyne to Southampton was part of the same operation. Authority for this is said to be found in the reasoning of some of the speeches in the House of Lords in cases to which I will refer. The first citation was from the *Petersham* and *Matiana* cases (1) where Lord Cave referred to the *St. Oswald* case (1) and said (2) that the *St. Oswald* and the French battleship *Suffren* with which she collided were both proceeding to evacuate troops from Cape Helles and were therefore very plainly engaged in warlike operations. Sir Robert Aske laid a great deal of emphasis on Lord Cave's statement that the *St. Oswald* and the *Suffren* were "proceeding "to evacuate troops . . . . and were therefore very plainly "engaged in warlike operations" and he relied on this as authority for the proposition that a ship which is on her way to take troops or war material on board is just as much engaged in a warlike operation as a ship which is actually engaged in the transport of troops or war material. I think this is overstraining the language used by Lord Cave. The *St. Oswald* was clearly being employed at the time of the collision in the evacuation of troops from Gallipoli in pursuance of orders and instructions from the Admiralty, and on the facts of that case there was ground, quite apart from the Attorney-General's admission, for coming to the conclusion that she was engaged in a warlike operation just as much as the French battleship. A statement somewhat similar to that made by Lord Cave is to be found in Lord Atkinson's speech in the same case (3) where he said that the *St. Oswald* had not got troops on board at the time of her collision with the *Suffren* when she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board. "This circumstance" Lord Atkinson said "does not, in my view, alter the character of the operation "she was at the time of collision performing." I make the same comment on this passage from Lord Atkinson's speech as I have made upon Lord Cave's statement. The facts of each case differ and the opinions expressed by Lord Cave and Lord Atkinson in the *St. Oswald* case (2) must be considered in relation to the actual facts of that case. Next I was referred to passages which are to be found in the speeches of Lord Finlay and Lord Wrenbury in the *Ardgantock* and *Larrinaga* cases: *Attorney-General* v. *Ard Coasters, Ld.* (4), and *Liverpool and London War*

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(1) [1921] 1 A. C. 99.
(2) [1921] 2 A. C. 141.
(3) [1923] A. C. 191, 197.

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(1) [1918] 2 K. B. 879.
(2) [1921] 1 A. C. 109, 116.
(3) [1921] 1 A. C. 116.
(4) [1921] 2 A. C. 141.

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WHARTON (J.) (SHIPPING) LD. *v.* MORTLEMAN.

Lord Caldecote C.J.

Risks Insurance Association, Ld. v. *Marine Underwriters of s.s. Richard de Larrinaga* (1). Lord Finlay made the following statement (2): "The question which remains, and which is "not absolutely covered by authority, is what is the position "in such a case as the present one where one of His Majesty's "ships is sailing at night without lights, but is not at the "moment actively engaged in definite warlike operations— "such as patrolling and being on the lookout for submarines, "or actually convoying ships—but is proceeding to her "station for the purpose of taking up her duties there as a "convoying ship." Then Lord Finlay proceeds to decide the question by approving what Atkin L.J. (3) and Bailhache J. had said (4) in the *Petersham* case and Bankes L.J. in the case under appeal (5). All three observations were made with reference to warships. Lord Finlay said (6): "Protecting "convoys is a form of warlike operation, it is an operation in "the course of war necessary to be performed by war vessels "for the purpose of protecting the merchantmen. I cannot "separate the proceeding under orders to the spot where the "duty is to be discharged from the actual discharge of the "duty itself; both form part of the warlike operation. It is "just as much a part of a warlike operation to get your ships "or your troops to the spot where a thing is to be done as it is "to do it when you get to the spot. It is said: 'Oh, there "'may be great difficulties in saying when the progress to "'the place of operation begins.' Well, nice questions might "arise in some cases, but it seems to me perfectly plain that "when a war vessel is actually at sea, and is there because she "is under orders to go to a particular spot to undertake a "warlike operation, whatever its nature may be, she is "engaged in that warlike operation, because she is doing that "which is necessary to get to the spot where the actual thing "is to be done." Similarly, Lord Wrenbury dealt (7) with the question whether the warship in question, namely, *H.M.S.*

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(1) [1921] 2 A. C. 141.
(2) Ibid. 151.
(3) [1919] 2 K. B. 670, 695.
(4) [1920] 1 K. B. 700, 705.
(5) [1920] 3 K. B. 65, 70.
(6) [1921] 2 A. C. 151.
(7) Ibid. 156.

Devonshire, was engaged on a war errand " so that she was "engaged in a warlike operation at the moment when the "collision occurred." Lord Wrenbury said (1) that there were many cases in which there might be great difficulty in answering the question whether at a particular moment a ship of war is engaged in a warlike operation. " I do not think it is "enough " he said " to say that the ship was a warship and "was proceeding under orders given by naval authority." It is plain from the statements which I have quoted that Lord Finlay and Lord Wrenbury were dealing with warships. Lord Wrenbury gave as illustration of his opinion (1) that it was not enough to say that the ship was a warship in a case where the ship was under orders to go into dock to be overhauled and was simply proceeding there. That, he said, might be different from the case where she was going to a particular place to take part in an action which was proceeding or immediately expected. In the latter case he said the warship would certainly be on a war errand and engaged in a warlike operation.

I have to deal not with a warship but with a merchant ship which had been requisitioned with a view to her use in carrying troops or war material. I come back to the question, was this ship the *Alderpool* engaged in a warlike operation ? If I was constrained by authority to find that she was so engaged, that would be an end of the matter. But Sir Robert Aske was unable to cite any other decisions or statements in support of his contention than those with which I have already dealt, and I am free to decide this question solely on the facts as I find them.

In my judgment the *Alderpool* was not engaged in a warlike operation at the time of the collision. There was nothing warlike about her or her movements or her duties. When she reached Southampton a different set of facts would very likely arise, justifying a finding that she was then engaged in a warlike operation. That time, however, had not yet come. I am not so presumptuous as to attempt any definition of the phrase " warlike operation." Lord Sumner in the *Larrinaga*

(1) [1921] 2 A. C. 156.

case thought such a task had better be left to those of their Lordships who would be sitting in the next war (1). I would respectfully doubt whether it is ever likely to be performed either in this or any other war so as to provide a short cut to a right determination on the facts of each case.

Having regard to my finding that the *Alderpool* was not engaged on a warlike operation, and there being no suggestion that the *Brendonia* was so engaged, there is no necessity to deal with the arguments which I heard on the question of the cause of the loss of the *Brendonia*. If my view on the first question is wrong, and the right view is that the *Alderpool* was engaged in a warlike operation it would seem on the authorities and on the facts of the case that the collision was the result of the warlike operation.

In the result the first-named defendant, who is prima facie liable under the policy of marine insurance and can only succeed by showing that there was a loss by an excepted peril, fails. Judgment must be given for the plaintiffs against the first-named defendant for the sum of 69*l.* 18*s.* with interest at the rate of 4 per cent. from September 11 to the date of payment. The first-named defendant must pay the costs of the plaintiff and of the second-named defendant.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for first defendant: *Ince, Roscoe, Wilson & Glover.*
Solicitors for second defendants: *J. A. & H. E. Farnfield.*

(1) [1921] 2 A. C. 153-4.

W. L. L. B.

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Oct. 16, 17.

CAMERON *v.* ROYAL LONDON OPHTHALMIC HOSPITAL.

Master and servant—Truck Acts—Deductions from wages for board, lodging and laundry—Part of wages paid otherwise than in current coin—Claim for recovery of amounts so deducted—Domestic servant—Stoker employed in hospital—Hospital a domestic establishment—Failure of claim—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *ss.* 1, 3, 4, 20, 23*—Employers and Workmen Act,* 1875 (38 *&* 39 *Vict. c.* 90), *s.* 10*—Truck Act,* 1887 (50 *&* 51 *Vict. c.* 46), *s.* 2*—Truck Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 38), *s.* 1.

A man was employed in a hospital from 1929 to 1937 at first as a stoker and subsequently as a general handyman in and about the hospital. He was paid wages in cash and in addition the hospital provided him with board, lodging and laundry. He left the employment of the hospital in May, 1937. In 1940 he brought an action against the hospital claiming to recover, under s. 4 of the Truck Act, 1831, the value of the board, lodging and laundry provided for him by the hospital during the whole period of his employment by the hospital as being so much of the wages earned by him in that employment as had not been actually paid to him in the current coin of the realm. The defendants alleged that the plaintiff was not at any time during his employment engaged as a workman within the Truck Acts, 1831 and 1887, and therefore was not entitled to recover wages, if any, earned by him and not actually paid to him in current coin of the realm. The defendants also relied on the Truck Act, 1940, s. 1:—

Held, that the plaintiff was a domestic servant in the employ of the defendants, and that, therefore, his claim failed.

Semble that if the plaintiff had not been a domestic servant, although the Truck Act, 1940, s. 1, would have barred his claim in respect of board, that Act would not have been any bar to his claim to recover in respect of lodging and laundry, as those services did not fall within the purview of that Act.

ACTION tried by du Parcq L.J. sitting as an additional judge of the King's Bench Division, without a jury.

The plaintiff, Alexander Cameron, had been in the employment of the Royal London Ophthalmic Hospital as a stoker from October 3, 1929, to May 1, 1937. He brought this action against the hospital in which he claimed to recover 657*l.* 8*s.* under s. 4 of the Truck Act, 1831, being 344*l.* 15*s.* for board at 17*s.* 6*d.* per week for 394 weeks from October 3, 1929, to May 1, 1937, 295*l.* 10*s.* for lodging at 15*s.* per week for the same period, and 29*l.* 11*s.* for laundry at 1*s.* 6*d.* per week for the same period less 12*l*. 8*s*. in respect of holiday allowances; being so much of the wages earned by the plaintiff in his employment by the defendants as a stoker by way of manual labour as had not been actually paid to him in the current coin of the realm.

The defendants by their defence admitted that the plaintiff entered their employment as a stoker on or about October, 1929, and continued in such employment until 1934. They alleged that from 1934 until May, 1937, the plaintiff was employed by the defendants as a general handyman in and about the hospital. The defendants admitted that the plaintiff had been provided by them throughout the said period with board, lodging and laundry but they denied that the same were of the value alleged in the statement of claim. The defendants further denied that the plaintiff was at any time during the said period of employment by them engaged in manual labour or otherwise as a workman within the Truck Acts, 1831 and 1887, and they said that the plaintiff was thereby not entitled to recover the wages earned by him which had not been actually paid to him in the current coin of the realm (if any, which was not admitted).

According to the evidence the plaintiff was employed by the defendants as a stoker in their engineering department. His duties at first consisted chiefly of stoking the boilers by hand, which was heavy work. Later, mechanically fired boilers were installed, and the defendants employed the plaintiff also as a mechanic in which capacity his duties included stoking, cleaning and repairing boilers, packing steam and water glands on pumps and turbines, attending to all minor repairs to taps and lights in the hospital, and assisting engineers with the overhauling or repair of electrical or mechanical appliances.

In the course of the hearing it was admitted by counsel for the plaintiff that the claim for board was not maintainable by reason of the Truck Act, 1940, and that portion of the plaintiff's claim was consequently abandoned.

B. J. M. MacKenna for the plaintiff. The plaintiff was

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provided by the defendant hospital with lodging and laundry during the period he was employed by the hospital. That was part of his wages, and as that part of his wages was not paid to him in the current coin of the realm he is entitled under s. 4 of the Truck Act, 1831, to recover so much of the wages earned by him as shall not have been actually paid to him by his employers in the current coin of the realm. The Act means that the workman is entitled to be paid the market price of the commodity supplied to him and not merely the cost of the article to the employer. It was held by Wrottesley J. in *Pratt* v. *Cook, Son & Co.* (*St. Paul's*), *Ld.* (1), that a man who had been employed for many years as a packer with a firm of wholesale drapers, and who had been supplied by his employers with dinner and tea on the premises in addition to the weekly sum which they paid to him in cash, was entitled to recover from his employers under s. 4 of the Truck Act, 1831, the agreed value of the meals so supplied, as being so much of his wages as had not been actually paid to him by his employers in the current coin of the realm. That decision was subsequently affirmed by the House of Lords (2). It is true that that decision does not enable the plaintiff in the present case to recover the value of the food supplied to him by reason of the Truck Act, 1940, but the decision is still good law with regard to other things supplied to him, such as lodging and laundry which do not fall within the purview of the Truck Act, 1940. In order to come within s. 1 of the Act there must be " a contract for the supply " of anything or the demise of any premises in respect of which " a stoppage or deduction from the wages of the worker might " lawfully have been made under s. 23 of the Truck Act, 1831, " if an agreement therefor had been made in writing and " signed by him." That Act does not deal with the provision of services such as laundry. There was no demise of premises to the plaintiff within the meaning of the Act. There is a great distinction between a lodger and a person to whom premises are demised. The plaintiff was not a domestic servant or menial servant so as to come within the exception

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(1) [1938] 2 K. B. 51.

(2) [1940] A. C. 437.

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in s. 20 of the Truck Act, 1831. It was held by Roche J. in *In re Vellacott* (1) that a man employed in the Royal Holloway College as a painter and decorator was a craftsman pure and simple and not a domestic servant. The plaintiff in the present case upon the facts was a mechanic like a plumber or electrician and not like a domestic servant. He was in the nature of a craftsman and came within the definition of a "workman" in the Employers and Workmen Act, 1875.

Tristram Beresford K.C. and *Michael Bull* (for *Sidney H. Noakes*, on war service) for the defendants. The plaintiff was a domestic servant and therefore outside the provisions of the Truck Act, 1831. From 1929 to 1934 he was employed exclusively as a stoker, and was then clearly a domestic servant. After the mechanical stokers were installed in 1934 he was employed as a stoker plus a handyman. The true test of what constitutes a domestic servant was stated by Collins J. in *Pearce* v. *Lansdowne* (2) where he said: "I "agree that this question"—namely whether a person is a domestic or menial servant—"must vary with the facts of "each particular case, and for the principle that I am to "apply I can find no better statement than that which is "enunciated in Roberts' and Wallace's book on Employers' "Liability, at p. 214, viz., that menial servant denotes 'those "'persons whose main duty is to do actual bodily work as "'servants for the personal comfort, convenience, or luxury "'of the master, his family and his guests, and who for this "'purpose become part of the master's residential or quasi- "'residential establishment.' I do not think that the direction "which ought to be given to a jury could be better stated." In *In re Junior Carlton Club* (3) the club servants were held by Roche J. to be domestic servants within the meaning of the Unemployment Insurance Act, 1920, notwithstanding that they did not reside upon the club premises. Roche J. in that case said (4) that "domestic servants are servants, whose "main or general function it is to be about their employers' "persons, or establishments, residential or quasi-residential,

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(1) [1922] 1 K. B. 466.

(2) (1893) 69 L. T. 316, 319.

(3) [1922] 1 K. B. 166.

(4) Ibid. 170.

"for the purpose of ministering to their employers' needs or "wants, or to the needs or wants of those who are members "of such establishments, or of those resorting to such establishments, including guests." That dictum directly applies to and covers the present case. In most large domestic establishments central heating is installed, and a stoker is permanently employed to attend to the stoking of the boilers, and such person is a domestic servant. Roche J. held in *In re Vellacott* (1) that a stoker employed exclusively at a large college to light and stoke the fires of an engine driving a dynamo supplying light and heat to the college was engaged in domestic service. In *Nowlan* v. *Ablett* (2) it was held that a head gardener who resided in a house belonging to his employer, in his domain, but apart from his employer's house, was only a menial servant and was, therefore, only entitled to a month's warning. It was held in *Nicoll* v. *Greaves* (3) that a huntsman was a menial servant, and therefore that the hiring, though in terms for a year and upon conditions which could only be fully carried out by a service enuring for the full period of a year, was subject to the ordinary condition that it might be determined by either party at a month's notice.

Even if the plaintiff is not a domestic servant he is not entitled to recover in this action because s. 1 of the Truck Act, 1940, provides that " no action or other legal proceeding "for wages earned before the date of the commencement of this "Act in respect of anything done in consideration of any such "thing supplied or premises demised before that date, shall be "instituted under s. 4 of the said Act . . . . and any such "action or other legal proceeding as aforesaid, whether civil "or criminal, instituted before the commencement of this "Act shall be discharged and made void." The Act applies to " the supply or a contract for the supply of anything or "the demise of premises in respect of which a stoppage or "deduction from the wages of the worker might lawfully "have been made under s. 23 of the Truck Act, 1831." That covers everything claimed in this case.

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(1) [1922] 1 K. B. 466.
(2) (1835) 2 Cr. M. & R. 54.
(3) (1864) 17 C. B. (N. S.) 27.

DU PARCQ L.J. This is an interesting case, and I have had the advantage of a most useful argument on both sides. The plaintiff claims the sum of 657*l.* 8*s.* He says that by reason of the provisions of the Truck Act, 1831, he is entitled to recover that sum as being so much of the wages in his employment by the hospital as had not been actually paid to him in the current coin of the realm. It is plain that if he was not a domestic servant while in the employment of the defendant hospital he is entitled to recover part of that sum. There is no doubt that he comes within the definition of "artificer" in s. 25 of that Act if he was not a domestic servant. The question in the case is whether he was a domestic or menial servant. Even if he was not a domestic servant he would not be entitled to recover the whole amount of his claim, by reason of the Truck Act, 1940. The recent decision of the House of Lords in *Pratt* v. *Cook, Son & Co.* (*St. Paul's*), *Ld.* (1), has made plain what previously had been doubtful. The plaintiff, on the assumption that he was not a domestic servant, would have been entitled, but for the Act of 1940, to recover under every head of his claim, as appears from that decision. The Act of 1940 has, however, restricted the rights of persons who were entitled to make such a claim. Mr. MacKenna on behalf of the plaintiff admitted that by reason of the Act of 1940 he could not maintain any claim in respect of board, because that is one of the matters in respect of which a stoppage or deduction from the wages of the worker might lawfully have been made under the Act of 1831. As regards the claim for lodging and laundry, Mr. MacKenna rightly contends that there is nothing in the Act of 1940 to bar the plaintiff's claim. It is elementary law, and generally well known, that permitting a man to occupy a bed in a house is not a demise of premises; and it is equally plain I think that there is nothing in s. 23 of the Truck Act, 1831, to cover such a service as laundry.

The only question in the case left is, therefore, whether or not the plaintiff was a domestic servant when he was employed by the Royal London Ophthalmic Hospital.

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(1) [1940] A. C. 437.

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One or two matters must be borne in mind in dealing with that question. It is, as counsel for the defendants correctly says, a question of fact, but, like other questions of fact, it has to be decided with regard to certain principles. It would not be right to leave to a jury the question whether or not the plaintiff was a domestic servant without some explanation of what those words must mean from the point of view of their legal interpretation. On the other hand, it must not be forgotten that in the last resort it is a question of fact, and that about such questions of fact different views may be taken by different persons.

It is also important to remember that there are many Acts of Parliament in which the phrase "domestic servant" appears, and that nothing is more dangerous than to argue from decisions on the meaning of the words in one Act to decisions on their meaning in another Act. Regard must be had to their context. Here there is a double danger. First of all, it may be forgotten that it is a question of fact and there may be a temptation to follow the decisions of other judges in cases where the facts were not precisely similar; and, secondly, a judge may be induced to pay too much attention to the interpretation of the same phrase in another Act.

Having said this in order to show that I have not been unduly affected by other decisions, I must say that I have derived assistance from the words of Roche J. in *In re Junior Carlton Club* (1) although he was there dealing with a different statute. I am not in the least influenced by the fact that in *In re Vellacott* (2) Roche J. decided that a man employed as a stoker in that particular case was a domestic servant. The learned judge most prudently said: "I am not going to decide "any other case of employment as a stoker except this one." That was a warning that he was not intending to lay down any general rule.

In *In re Junior Carlton Club* (1), however, also a case under the Unemployment Insurance Act, 1920, the learned judge, after a reference to a text-book and after saying, as I do, that he was not attempting to formulate a definition of what is a domestic servant "even for the purposes of this Act," went on to say (1): "But if I had, in my own words, to describe "what are the characteristics of such a servant I should express "it, and do express it for present purposes, in the way that I "sought to express it in the course of the argument in this "case—namely, that domestic servants are servants, whose "main or general function it is to be about their employers' "persons, or establishments, residential or quasi-residential, "for the purpose of ministering to their employers' needs or "wants, or to the needs or wants of those who are members "of such establishments, or of those resorting to such establishments, including guests. That description, which, as I "say, is not intended to be an exhaustive one, certainly "covers the case of a club."

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(1) [1922] 1 K. B. 166.

(2) [1922] 1 K. B. 466.

I shall not attempt a definition, and anything which I say is not intended to be exhaustive or to include other cases as probably coming within the Act. There is no doubt, of course, that the plaintiff was a servant. Was he a domestic servant? Roche J.'s words may, in my opinion, be applied to this case. The phrase "domestic servant" calls up a definite idea to the mind of everybody. To the mind of a man with a small house and of modest means it probably calls up a picture of a maid servant. Others will be more likely to think of a butler, a footman, a chauffeur, gardeners and so forth. What quality have all these people in common? They all come within the description given by Roche J. in *In re Junior Carlton Club* (1) quoted above. Consideration of the Truck Acts justifies the statement that what Parliament had in mind in framing the definition of "workman" in s. 10 of the Employers and Workmen Act, 1875, was that in modern civilized society the Truck Acts would work hardship, or at any rate the greatest inconvenience, unless they excluded those working in a home for the purposes of the upkeep and maintenance of the home. That is a truism. If it were not permissible to pay the general servants of a household partly in food and by the provision of sleeping accommodation the position of the householders would be almost impossible. The reason for that is not merely that the servant is treated as part of the family—to use the expression in the wider sense—but because he assists in the maintenance of the home and does work in and about it which, if it were not done by servants would have to be done either by the employer himself or, at the greatest inconvenience, by someone from outside. As a general rule, therefore, again let it be said without laying down anything intended to apply to every case, where there is what can properly be termed a domestic establishment, and some of the work in that establishment is done by a particular person for the purposes of the upkeep of the home and for the convenience of the members of the family, that person is a domestic servant. Sometimes he is a highly skilled person. There are great houses where a chef is employed who would not hesitate to admit that he was a domestic servant, but who at the same time regards himself as an exponent of a great art. There may be a chauffeur who not only drives but also attends to the mechanism of his employer's car. He is a domestic servant, but he is certainly no less a skilled engineer than is the plaintiff in this case.

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(1) [1922] 1 K. B. 166, 170.

Applying these observations to the facts of this particular case, the first question is whether or not this hospital can be brought within the description of a domestic establishment or domus. Such a description would no doubt apply to a boarding-school. It could, in my opinion, be applied also to a residential college in a university, and I have no doubt that it applies to a hospital. Indeed some hospitals are now commonly referred to as homes. A "nursing home" is the expression used to describe a hospital run as a paying concern. There is also the expression "mental home." The term "domestic" may be applied to establishments of that kind. Those who live there regularly, as members of the staff, and temporarily as patients, may be regarded as a family in a wide sense, and certainly the establishment is of a domestic character as a whole.

There is no very great dispute as to the duties of the plaintiff on the evidence. The evidence of the chief maintenance engineer of the defendant hospital shows that the work done by the plaintiff at first was that of a stoker, and that as he acquired more experience he was promoted and better paid, gathered a good deal of knowledge, and was eventually styled a mechanic. As a mechanic he did certain things requiring skill, such as boiler-cleaning and repairing the conveyor which carries coal and which was introduced in place of the old hand-firing system. He also executed minor operations on pumps and turbines, he burnt rubbish and did odd jobs in the way of minor repairs, attending to the lamps and lighting, and helping to keep the department clean.

In a home, whether it be a private house or a large hospital, the heating arrangements are of a different character from what was considered sufficient in 1831 when the first Truck Act was passed, or even when the Employers and Workmen Act, 1875, was passed. In most large country houses central heating has been adopted, so that there are boilers which need attendants. That is a normal state of affairs in a large establishment. In a small establishment a small boiler may be left to the care of the gardener, or even of one of the female staff. That cannot be the case in a large establishment; and it is equally impossible, or at any rate inconvenient, in such an establishment to have to rely on calling in assistance from outside to attend to the boilers. There is no doubt that the plaintiff very often did things which a domestic servant ordinarily might not have been able to do. The work of an engineer or of a mechanic covers a multitude of tasks, but everything which the plaintiff did, whether in the course of routine or in an emergency, was for the upkeep of the establishment and for the convenience and comfort of those living in it.

It is obviously convenient in a large institution of this kind to have somebody on the premises who can do that kind of work and who is available at all times. It was understood that if anything went wrong during the night watches the plaintiff could be called on to endeavour to put it right. That was one very good reason why he should be on the premises at all times and be treated as one of the domestic staff, as, in fact, he was.

It is not to be forgotten that he was paid overtime if he was called on to do work after his daily eight hours had expired, but, on consideration, that does not really affect the question. It might well be arranged with an ordinary domestic servant that if she were called on to do work after a certain time of the day she should be paid extra, and there are occasions, in fact, when a servant volunteers to do something beyond what is usually asked of her and is rewarded for it.

Having considered the matter as I would have told a jury to consider it, and having decided it as a question of fact, I have come to the conclusion that the plaintiff was a domestic servant in the employ of the defendants. Most people might very well, if they had been asked, not have spoken of him as a domestic servant, using the expression colloquially; nevertheless, in my opinion, he was one according to the true meaning of that phrase, which is not limited to those who do only what is called house-work in the narrower interpretation. That being so, the plaintiff's claim fails and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiff: *J. E. Churchill & Co.*
Solicitors for defendants: *Bircham & Co.*

R. F. S.

NOTE.

Truck Act, 1831, s. 1: ". . . . In all contracts hereafter to be "made for the hiring of any artificer in any of the trades hereinafter "enumerated, or for the performance by any artificer of any labour "in any of the said trades, the wages of such artificer shall be made "payable in the current coin of this realm only, and not otherwise; "and that if in any such contract the whole or any part of such wages "shall be made payable in any manner other than in the current coin "aforesaid, such contract shall be and is hereby declared illegal, null, "and void."

Sect. 3: "And be it further enacted, that the entire amount of the "wages earned by or payable to any artificer in any of the trades

" hereinafter enumerated, in respect of any labour by him done in " any such trade, shall be actually paid to such artificer in the current " coin of this realm, and not otherwise; and every payment made to " any such artificer by his employer, of or in respect of any such wages, " by the delivering to him of goods, or otherwise than in the current " coin aforesaid, except as hereinafter mentioned, shall be and is " hereby declared illegal, null, and void."

Sect. 4: " And be it further enacted, that every artificer in any of " the trades hereinafter enumerated shall be entitled to recover from " his employer in any such trade, in the manner by law provided for " the recovery of servants' wages, or by any other lawful ways and " means, the whole or so much of the wages earned by such artificer " in such trade as shall not have been actually paid to him by such " his employer in the current coin of this realm."

Sect. 20: " And be it further enacted, that nothing herein contained " shall extend to any domestic servant or servant in husbandry."

Sect. 23: " And be it further enacted and declared, that nothing " herein contained shall extend or be construed to extend to prevent " any employer of any artificer, or agent of any such employer, from " supplying or contracting to supply to any such artificer any medicine " or medical attendance, or any fuel, or any materials, tools or " implements to be by such artificer employed in his trade or occupation, " if such artificer be employed in mining, or any hay, corn or other " provender to be consumed by any horse or other beast of burden " employed by any such artificer in his trade and occupation; nor " from demising to any artificer, workman or labourer employed in " any of the trades or occupations enumerated in this Act the whole " or any part of any tenement at any rent to be thereon reserved; " nor from supplying or contracting to supply to any such artificer " any victuals dressed or prepared under the roof of any such employer, " and there consumed by such artificer; nor from making or contracting " to make any stoppage or deduction from the wages of any such " artificer for or in respect of any such rent; or for or in respect of " any such medicine or medical attendance; or for or in respect of " such fuel, materials, tools, implements, hay, corn or provender, or " of any such victuals dressed and prepared under the roof of any such " employer; or for or in respect of any money advanced to such " artificer for any such purpose as aforesaid: Provided always, that " such stoppage or deduction shall not exceed the real and true value " of such fuel, materials, tools, implements, hay, corn and provender, " and shall not be in any case made from the wages of such artificer, " unless the agreement or contract for such stoppage or deduction " shall be in writing, and signed by such artificer."

Employers and Workmen Act, 1875, s. 10: " In this Act —The " expression 'workman' does not include a domestic or menial " servant, but save as aforesaid, means any person who being a " labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner or otherwise engaged in manual labour, whether under " the age of twenty-one years or above that age, has entered into or " works under a contract with an employer, whether the contract be " made before or after the passing of this Act, be express or implied, "oral or in writing, and be a contract of service or a contract personally "to execute any work or labour."

Truck Act, 1887, s. 2: "The provisions of the principal Act"—the Truck Act, 1831—"shall extend to, apply to, and include any "workman as defined in the Employers and Workmen Act, 1875, s. 10, "and the expression 'artificer' in the principal Act shall be construed "to include every workman to whom the principal Act is extended and "applied by this Act, and all provisions and enactments in the principal "Act inconsistent herewith are hereby repealed."

Truck Act, 1940, s. 1, sub-s. 1: "Where before the commencement "of this Act the whole or any part of the consideration for the hiring "of a worker or for the performance of any labour by a worker was the "supply or a contract for the supply of anything or the demise of any "premises in respect of which a stoppage or deduction from the wages "of the worker might lawfully have been made under section twenty-"three of the Truck Act, 1831, if an agreement therefor had been "made in writing and signed by him, no action or other legal proceeding "for wages earned before the date of the commencement of this Act "in respect of anything done in consideration of any such thing "supplied or premises demised before that date, shall be instituted "under section four of the said Act, ... and any such action or "other legal proceeding as aforesaid, whether civil or criminal, "instituted before the commencement of this Act shall be discharged "and made void, subject to such order as to costs as a Court or a "judge thereof may think fit to make."

Sub-sect. 3: "In this Act the expression 'worker' has the meaning "assigned to the expression 'workman' by section ten of the "Employers and Workmen Act, 1875."

The date of the commencement of this Act was July 10, 1940.

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Nov. 18, 19, 29.

Revenue—Income tax—Sur-tax—Covenant in deed to pay one-fourth of income to trustee—Definition of "income" in deed—"Income of "settlor as computed for the purposes of the Income Tax Acts"—Construction—Undistributed income of company—Apportionment of part of income to settlor—Assessment to sur-tax upon him in name of company—Payment by settlor to trustee of one-quarter of apportioned sum—Return of income-tax for purposes of sur-tax—Whether one-quarter of apportioned sum is payable to trustee and therefore deductible in return for sur-tax—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 21*—Finance Act,* 1923 (13 & 14 *Geo.* 5, *c.* 14), *s.* 24*—Finance Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *s.* 20.

By a deed dated March 22, 1935, the appellant covenanted to pay every year to a trustee an annual sum equal to one-fourth of his income less income tax. The expression "income" was defined in the deed as "the income of the settlor as computed for "the purpose of the Income Tax Acts, but excluding therefrom "such income as may accrue to him as a member of an underwriting syndicate at Lloyd's and after deducting therefrom all "annual sums, annuities or interest (excluding the sum payable "under this deed) as are allowed as deductions in computing "total income for the purpose of the said Acts." Directions were made by the Special Commissioners upon a company under s. 21 of the Finance Act, 1922, as extended by s. 20 of the Finance Act, 1936, for the year ending December 31, 1935, and the period from January 1 to February 3, 1936, and they apportioned the sum of 45,484*l.* out of the actual income of the company for the said periods to the appellant. An assessment to sur-tax for the year 1935-36 under s. 21, sub-s. 2, of the Finance Act, 1922, was made upon the appellant in the name of the company in the sum of 45,484*l.* The appellant claimed that in consequence of such assessment he was liable under the deed to pay a sum of 11,371*l.* to the trustee under that deed, and in fact he paid that sum less income tax to the trustee. The appellant having paid sur-tax on the sum of 45,484*l.* claimed that he was entitled to relief from sur-tax on 11,371*l.* under s. 24 of the Finance Act, 1923, by reason of an error or mistake :—

Held, that on the construction of the deed the income of the appellant "as computed for the purposes of the Income Tax "Acts" included the sum apportioned to him under s. 21 of the Finance Act, 1922. The income referred to in the definition in the deed was "total income." The appellant was therefore entitled to relief from sur-tax on the sum of 11,371*l.* paid by him to the trustee under the deed.

Decision of Lawrence J. [1940] 2 K. B. 372 reversed.

APPEAL from a decision of Lawrence J. (1) on a case stated under the Income Tax Act, 1918, s. 149 and the Finance Act, 1923, s. 24, as extended to sur-tax by s. 42, sub-s. 3, of the Finance Act, 1927, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on November 18, 1938, Mr. Ernest L. Payton (hereinafter called the appellant) appealed against the decision of the Commissioners of Inland Revenue refusing relief from sur-tax paid by him under the assessment made upon him for the year 1935–36, which the appellant alleged was excessive by reason of an error or mistake in the return or statement made by him for the purposes of such assessment.

In his return of income from all sources for the year 1935–36 rendered on June 25, 1936, the appellant had made no deduction in respect of a sum of 11,371*l.* alleged to be payable by him under an indenture dated March 22, 1935, hereinafter referred to. The appellant claimed that this was an allowable deduction in computing his liability for sur-tax in the year in question.

Two questions arose for decision in the case, first, whether the sum of 11,371*l.* was due and payable under the said indenture of March 22, 1935, and, secondly, if it were, whether the appellant was entitled to relief in respect thereof by reason of error or mistake under s. 24 of the Finance Act, 1923 (2).

By the said indenture of March 22, 1935, the appellant covenanted with a trustee therein named that he would, during his life, in every year pay to the trustee an annual sum (subject to deduction of income tax at the standard rate for the time being in force) equal to one-fourth of his income as defined in clause 2 thereof. In clause 2 the expression "income" was defined as " the income of the settlor as computed for the "purpose of the Income Tax Acts, but excluding therefrom "such income as may accrue to him as a member of an "underwriting syndicate at Lloyd's, and after deducting

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(1) [1940] 2 K. B. 372.

(2) The second question was not argued, the Crown admitting that if the appellant was right with regard to the first question he was entitled to relief.

"therefrom all annual sums, annuities or interest (excluding "the sum payable under this deed) as are allowed as deductions "in computing total income for the purpose of the said Acts."

On July 29, 1937, the Special Commissioners confirmed on appeal certain directions made upon Birmingham Criterions, Ld. (in liquidation), under s. 21 of the Finance Act, 1922, as extended to investment companies by s. 20 of the Finance Act, 1936, for the year ended December 31, 1935, and the period from January 1, 1936, to February 3, 1936, and apportioned the sums of 43,946*l.* and 1538*l.* out of the actual income of the company for said periods respectively to the appellant.

An assessment to sur-tax for the year 1935–36 under s. 21, sub-s. 2, of the Finance Act, 1922, had been made upon the appellant in the name of the company in the estimated sum of 65,000*l.* This assessment was on the same day reduced by the Special Commissioners to the sum of 45,484*l.*, being the total of the two sums apportioned to the appellant as aforesaid. The said directions, apportionment and assessment were subsequently confirmed by the High Court: *Birmingham Criterions, Ld.* (*in liquidation*) v. *Inland Revenue Commissioners* (1).

The sur-tax payable in respect of the assessment upon the appellant in the name of the company was subject to an adjustment which might become necessary as a result of any increase or reduction which might be made in the personal assessment to sur-tax upon the appellant for the year 1935–36.

The appellant had not been required by the Special Commissioners to make an amended statement of total income pursuant to para. 8 in the First Schedule to the Finance Act, 1922.

The appellant claimed that, in consequence of such assessment made upon him in the name of the company, he was liable under the deed of March 22, 1935, to pay a sum to the trustee under that deed amounting to 11,371*l.* and in fact on April 15, 1938, he paid to the trustee such sum less income tax at 4*s.* 6*d.* in the £, being the standard rate of tax for the year in which the amount became due and payable. There was no error or mistake in the return originally made by the appellant for the purposes of assessment to sur-tax for the reason that the additional liability to pay the sum of 11,371*l.* did not arise until the passing into law of the Finance Act, 1936, subsequent to the rendering of the return. The appellant claimed that, notwithstanding this, he was entitled to claim under s. 24 of the Finance Act, 1923, in respect of error or mistake.

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(1) (1938) 21 Tax Cas. 588.

The appellant contended :—

(1.) That the said sum apportioned to and assessed upon him was properly to be included in the income as defined in the deed.

(2.) That under the terms of the deed he was under a liability to pay a sum equal to a one-fourth part of that income, and that this entailed a further payment of 11,371*l.*

(3.) That there had been an error or mistake in his return rendered for purposes of sur-tax for the year 1935–36, although the error or mistake did not emerge until a subsequent date.

(4.) That he was entitled to relief under s. 24 of the Finance Act, 1923.

It was contended on behalf of the Commissioners of Inland Revenue (inter alia) :—

(1.) That income of the appellant as defined by clause 2 of the deed of March 22, 1935, did not include income apportioned to the appellant and assessed to sur-tax upon him in the name of Birmingham Criterions, Ld. (in liquidation), under s. 21 of the Finance Act, 1922.

(2.) That the said sum of 11,371*l.* was not an admissible deduction in computing the liability of the appellant to sur-tax for the year 1935–36.

(3.) That there had been no error or mistake in the return or statement rendered by the appellant for the year 1935–36, and that he was accordingly not entitled to relief under s. 24 of the Finance Act, 1923, as extended to sur-tax by s. 42, sub-s. 3 of the Finance Act, 1927.

The Commissioners who heard the appeal gave their decision in terms which after setting out the facts continued : " We "are of opinion that the expression 'income as computed for "'the purposes of the Income Tax Acts' in the said deed "operates to include income apportioned and assessed upon "the appellant under s. 21 of the Finance Act, 1922, and "deemed to be his income within the meaning of that section. "The consequence is that the appellant's liability under his "covenant for the year 1935-36 is increased by the sum of "11,371*l.*, and this sum, less tax, has in fact been paid by "him to the trustee.

"If that be the correct view, we are also of opinion that a "claim lies in this case under s. 24 of the Finance Act, 1923, "and that there has been an error or mistake within the "meaning of that section, notwithstanding that such error "or mistake did not emerge until the subsequent passing of "the Finance Act, 1936, and the direction and apportionment "made in pursuance thereof."

The parties were left to agree the figures and the parties having agreed the figures, the Commissioners authorized the repayment to the appellant of the sum of 668*l.* 2*s.* 9*d.*

On appeal Lawrence J. said that the question turned on the construction of the deed. He had come to the conclusion that the contention of the Crown was correct and that the income of the settlor as computed for the purpose of the Income Tax Acts within the meaning of clause 2 of the deed did not include sums which were apportioned to him under s. 21 of the Finance Act, 1922, such sums were not in fact his income; sur-tax thereon is assessed in the name of the company and the income of the settlor as defined in clause 2 did not mean his total income for the purposes of sur-tax.

Mr. Payton appealed. The appeal was heard on November 18, 19, 1940.

Cyril King K.C. and *F. Grant* for the appellant.

Sir William Jowitt S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

1940. Nov. 29. Sir Wilfrid Greene M.R. By a deed dated

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March 22, 1935, the appellant covenanted with a trustee that he would in every year pay to the trustee an annual sum (subject to deduction of income tax) equal to a one-fourth part of his income as defined in clause 2 thereof. By clause 2 the expression " year " was defined as meaning a year beginning on April 6 and ending on April 5 following. The definition of the expression " income " is in the following words: " The "expression ' income ' means the income of the settlor as "computed for the purpose of the Income Tax Acts, but "excluding therefrom such income as may accrue to him as "a member of an underwriting syndicate at Lloyd's, and "after deducting therefrom all annual sums, annuities or "interest (excluding the sum payable under this deed) as "are allowed as deductions in computing total income for the "purpose of the said Acts."

The operative clauses of the deed provided that the sums paid under it should be accumulated by the trustee and that the accumulated trust fund should be subject to a general testamentary power of appointment in the appellant with a trust in default of appointment for the appellant's next of kin. A power of revocation with the consent of the trustee was reserved to the appellant.

Having regard to the date when this deed was executed, it was admittedly effective to entitle the appellant to deduct any sums paid under it in computing his total income for the purposes of the Income Tax Acts. The question raised by this appeal is whether upon its true construction a certain sum is payable by the appellant under the deed.

It is to be borne in mind that this question must be approached as being what in truth it is, namely, a question as between covenantor and covenantee. The consequential effect of its decision upon the appellant's liability to tax is a purely collateral matter which cannot, I think, affect the construction of the deed. We were invited by counsel for the appellant to regard the deed as one the primary object of which was to enable the appellant lawfully to reduce his liability to sur-tax and to construe it with that consideration in view. This argument I am unable to accept. No one familiar with documents of this kind can fail to have a suspicion amounting almost to conviction that the object of the deed was as stated; but I doubt whether the probable object of the deed can be allowed to affect its construction. The fact that the ultimate destination of the trust fund is the appellant's own estate has led to the curious result that he is arguing in favour of an increase of his liability under the deed, his object being, of course, to secure the greatest possible diminution of his sur-tax liability. Had his covenant enured for the benefit of third parties he might well have argued in the opposite sense.

The appellant was the holder of shares in a company called Birmingham Criterions, Ld. Under the provisions of the Income Tax Acts relating to what is commonly called "company sur-tax" an assessment to sur-tax was made upon the appellant in the name of the company for the year 1935/6 in a sum eventually fixed at 45,484*l.* After some litigation this assessment was confirmed by the Court. Thereafter the appellant paid to the trustee of the deed the sum of 11,371*l.*, being one quarter of the sum of 45,484*l.* less income tax at the standard rate. He asserts that upon the true construction of the deed he was liable to make this payment and claims that a consequential reduction of his sur-tax assessment for the year 1935/6 ought to be made. It is now conceded that if the construction for which the appellant contends is correct, he will be entitled to the reduction claimed. The Commissioners for the Special Purposes of the Income Tax Acts accepted the view put forward on behalf of the appellant. On a case stated Lawrence J. reversed that decision and this appeal results.

Before any intelligible meaning can be given to the language of the deed, it is necessary to examine certain provisions of the Income Tax Acts. It is a commonplace to say that those Acts impose a tax on income. The basic charge imposed by the Acts is a charge on what may accurately be described as income of the individual taxpayer. The method of computing the income of the taxpayer for the purpose of tax in regard to a given year is artificial and leads to a result which in many and perhaps most cases does not represent the actual income received by the taxpayer in the year of assessment. But this does not alter the fact that the basic charge is a charge upon his income. There was from the first one qualification of this, namely, the assessment of tax under Schedule A which in a case where the taxpayer is himself the occupier of the land has no reference to any income actually received by him. Nevertheless, he was throughout treated as being in the beneficial enjoyment of the income which he could have derived from his ownership of the land had he been minded to do so.

To this basic conception of income tax certain qualifications have been made, the effect of which has been to treat for certain purposes as income of the taxpayer income which belongs in law not to him but to someone else. Examples of this are to be found in the case of husband and wife, and in the provisions of the Finance Act, 1922, s. 20 (which relates to income under revocable deeds and certain other dispositions), of the Finance Act, 1936, s. 21 (which relates to income settled on children) and of the Finance Act, 1938, s. 38 (which relates to income arising under certain kinds of settlement), and the case of company sur-tax which gives rise to the present question.

In the case of income tax as distinct from sur-tax, the charge is made effective in two ways, direct assessment and deduction at source. For the purposes of assessment no return is called for from the taxpayer except in the case of direct assessment. Nevertheless, payments from which the tax is deducted are his income and the tax paid is in reality his tax. But for certain purposes the taxpayer must make a return of his total income. Those purposes are (1.) claims to relief, (2.) sur-tax. I need not set out in detail the provisions of the Acts which deal with these matters. They can be extracted from ss. 27 and 207 of the Income Tax Act, 1918, No. XVII. in the Fifth Schedule to that Act (as amended by the Finance Act, 1927, s. 46, and Fifth Schedule, Part III.) and s. 38 of the Finance Act, 1927. Speaking generally, the same computation or "estimation" of the total income is required for both purposes, but there is an exception of some importance for the present discussion in the case of company sur-tax, to which reference will presently be made. Leaving this exception aside for the moment, the computation of total income is made by adding (1.) income which is the subject of direct assessment and (2.) income from which tax is deducted at source and deducting from the resulting sum the amount of payments made by the taxpayer from which he is entitled to deduct tax, the amount of those payments being, as I have already said, treated for tax purposes as income of the recipient and not of the payer.

The foregoing remarks are no doubt elementary, but they form a necessary introduction to the consideration of the present problem. I will now turn to the relevant matters connected with company sur-tax and its relation to the " total "income " of the shareholder concerned.

Under sub-s. 1 of s. 21 of the Finance Act, 1922, as amended, the machinery is set in motion by a direction of the Special Commissioners that the income of the company which is in question shall " for the purposes of assessment to super-tax "(now sur-tax) . . . . be deemed to be the income of the "members" and that it shall be apportioned among the members. Sur-tax is then to be assessed and charged in respect of each member, assessment being made on the member in the name of the company. Notice of charge to sur-tax is then served on the member who may elect to pay; if he does not do so, the tax is payable by the company (sub-s. 2). If the company does not pay, the tax is recoverable from the member (Finance Act, 1936, s. 19, sub-s. 5).

The income dealt with by these provisions is actually the income of the company and it will continue to belong to the company until a distribution is made among the members. But for the purposes of assessment to sur-tax it is deemed to be the income of the members and accordingly must be taken into account in computing their total income for sur-tax purposes. On the other hand, it would appear that it does not enter into the computation of total income for the purpose of a claim to relief; indeed, it would make no difference if it did, except in the very unlikely case of the member having no income or only a small income from other sources.

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It appears clear, therefore, that for one "purpose of the "Income Tax Acts" (to quote the definition clause in the deed), namely sur-tax, the apportioned income in question, although it is not in truth his income, must be taken into account in the computation of the income of the appellant for the year specified. It is true that the computation of income for the purpose of sur-tax is a computation of "total "income," but it is nevertheless a computation of income, and if the matter had stood there it could not have been doubted that the deduction claimed was admissible. But the argument for the Crown is based on the latter part of the definition which deals with deductions. It is said, and Lawrence J. agreed, that this provision would have been unnecessary if in the earlier part of the definition "income" had meant "total income," since the deductions mentioned are permissible in any event in a computation of total income. It is also pointed out that this latter part of the definition refers to "total income," whereas the earlier part refers to "income," and it is said that this variation in language shows that the computation of income cannot be a computation of total income. This argument appears attractive at first sight, but it at once suggests the question: If "income" does not mean "total income," what income does it refer to? It is said that it means and means only income of the appellant which is taxed (1.) by direct assessment and (2.) by deduction at source. But this answer is one which I am unable to accept, since no computation of a taxpayer's income is made either by the Inland Revenue authorities or by the taxpayer which includes income taxed at source—except for the purposes of sur-tax and claims to relief, and a computation made for either of those purposes is a computation of "total income" which is ex hypothesi excluded. In view of this difficulty it is pointed out by the appellant—I think correctly—that if "income" does not mean "total income" it must be limited to income which is subject to direct assessment, since that is the only "income" in respect of which a computation falls to be made. It is not possible, in my view, to place so limited a construction on the word, and I am accordingly driven to the

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conclusion that the computation referred to is the computation of total income for purposes of sur-tax. It is true that in the computation of total income for the purpose of a claim to relief the sum in question is not included and therefore for one purpose of the Income Tax Acts it does not enter into the computation. But if a choice has to be made between a computation of total income for the purposes of sur-tax and a computation of total income for the purpose of a claim to relief, it is on the former and not on the latter that the choice, in my opinion, should fall, since the governing purpose of the Income Tax Acts is to impose taxation, not to grant relief.

If the view which I have expressed is correct, the reference to deductions is to be explained by the fact that it was desired to exclude the deduction of the amount payable under the deed and it was thought convenient to provide for this by stating in terms that all deductions except that particular one were to be made.

Before concluding, I must refer to sub-s. 4 of s. 21 of the Finance Act, 1922. That sub-section provides that undistributed income which has been charged under the section is not, when subsequently distributed, to be deemed to form part of the total income for the purposes of sur-tax of any individual entitled thereto. This raises the question what the liability of the appellant under the deed would have been, if the company had continued as a going concern and had distributed the profits in question. Such a distribution could only have been made by way of dividend which would have been taxed at source. In the year of receipt such a dividend would not have entered into any computation of income of the appellant save a computation of total income for the one purpose of a claim to relief. But this would not, in my opinion, have brought the sum received within the scope of the deed, since a computation for the mere purpose of claiming relief would not, I think, be a computation for " the " purpose of the Income Tax Acts. I refer to this matter (which does not, of course, fall for decision) because an interpretation which brought within the scope of the deed both the amount assessed

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to sur-tax and the amount ultimately distributed by the company would not commend itself to me.

The deed is loosely drawn and neither of the interpretations proposed is free from difficulty; but, for the reasons stated, I prefer the view which I have expressed to that taken by Lawrence J.

The appeal will be allowed with costs here and below.

Clauson L.J. This is an appeal from an order of Lawrence J. of June 14, 1940, whereby he reversed a determination of the Special Commissioners, under which Mr. Payton had been granted relief to the extent of sur-tax on a sum of 11,371*l.* Mr. Payton had paid sur-tax on a sum based upon a return rendered by him on June 25, 1936, which at the time was a correct return. By reason, however, of certain subsequent events the true position, as Mr. Payton contended, was that the return and the consequent assessment for the year 1935/1936 required correction. It was contended at one time on behalf of the Crown that the error, if error there were, could not be corrected. That contention, however, was negatived by the Special Commissioners and has now passed from the case and it is no longer necessary to deal with it.

The subsequent events which, so Mr. Payton contended, justified a claim for a correction of the return and a modification of the assessment were as follows: On July 29, 1937, certain directions given under s. 21 of the Finance Act, 1922, in respect of Birmingham Criterions, Ld., became binding, with the admitted result that a portion of the actual income of that company had to be deemed to be the income of the members of that company, of whom Mr. Payton was one, and 45,484*l.*, part of that portion, was apportioned to Mr. Payton, with the consequence that (to apply the language of s. 21) sur-tax had to be assessed in respect of that sum for the year 1935/1936 upon Mr. Payton in the name of the company and became payable by the company, subject to the right of Mr. Payton to pay it himself if he thought fit. By virtue of r. 8 in the First Schedule to the Act of 1922, as amended by an Act of 1927, this sum of 45,484*l.* is (to apply the language of the rule) to be deemed for the purposes of sur-tax to represent the income from Mr. Payton's interest in Birmingham Criterions, Ld., and is to be included in the statement of his total income.

So far there is no difficulty or dispute. Admittedly the effect of that which I have stated in the preceding paragraph was to add 45,484*l*. to Mr. Payton's income as computed for sur-tax purposes.

The further matter which is the immediate cause of dispute arises from the fact that on March 22, 1935, Mr. Payton had executed a document by which he bound himself to pay away part of his income. It was not disputed that in regard to sur-tax for the period relevant to this case, namely, the year 1935/1936, the deed must be considered effective, and that Mr. Payton is entitled to relief from sur-tax in respect of that period in regard to the sum, whatever it may be, that he is liable to pay under that deed. The dispute arises on the question what it is that under that document Mr. Payton bound himself to pay away.

[His Lordship read clauses 1 and 2 of the deed and proceeded:] It is not necessary to set out any of the other provisions of the deed, but it may be observed that the deed is revocable at any moment by Mr. Payton with the consent of the trustee. There is also power to Mr. Payton to require the trustee to transfer the trust fund to Mr. Payton or as he may direct. Whether this requirement can only be made with the trustee's consent, I do not pause to enquire. The trust is to accumulate the fund, and the sole beneficiaries apart from Mr. Payton are the persons who take his residuary trust fund under his will or, if he dies intestate, those who take his estate on the intestacy. It is quite obvious that the sole purpose of the deed is to diminish the income immediately receivable by Mr. Payton, and that as his only interest in diminishing his income immediately receivable must be to diminish his liability to taxation, his interest must necessarily be, not as the interest of any ordinary covenantor would be, to put forward arguments to narrow the operation of the deed, but to put forward arguments to widen its operation; and accordingly Mr. Payton attempts to put as wide an operation as he can upon the terms of the covenant.

Mr. Payton's contention upon the terms of the deed (and as I have observed the only dispute is on the true construction of those terms) may be put in the simplest form. He says that the true purpose and obvious meaning of the deed is to diminish by force of the covenant the sum which is for purposes of taxation to be treated as his income by one-fourth, and its operation accordingly is to diminish by one-fourth, i.e., by 11,371*l.*, the 45,484*l.* which by virtue of the notional apportionment to him of that sum out of the actual income of the Birmingham Criterions Ld. has been added notionally to that which for purposes of taxation is to be treated as his income. This contention was accepted as correct by the Special Commissioners, who could see no answer to it. I find myself in the same position. I can see no answer to it. The terms of the document appear to me to lead quite plainly and clearly to the conclusion for which Mr. Payton contends. Lawrence J., however, rejected this contention on grounds which, after carefully considering the arguments of counsel for the Crown, which, in their ultimate analysis, appeared to me to resolve themselves into the grounds on which Lawrence J. decided, may be stated as follows: First, his Lordship took the view that the 45,484*l.* was not Mr. Payton's income. That no doubt is the case, but there is no question that under the statute that sum is to be deemed to be his income for the purpose at all events of assessing sur-tax. I feel myself quite unable to accept the view that income which is deemed by statute to be a man's income for the purpose of assessing sur-tax does not form part of the income of the settlor as computed for the purpose of the Income Tax Acts. It is to be deemed to be his income for the purpose of some taxation, i.e., the imposition of sur-tax, though not, it may be, for the imposition of the standard rate of tax. It appears to me to be correctly described as part of his income as computed for the purpose of the Acts, even though it may not be amenable to the whole of the taxation which in varying circumstances the Acts impose on various ingredients in his income. I am satisfied that a substantial part of the intention of the deed, as gathered from its terms as a whole, would be nullified if a narrower interpretation of the words were adopted, even if such narrower interpretation were possible as a matter of language.

Secondly, it was argued before Lawrence J., who was apparently attracted by the argument, though he does not perhaps base his decision upon it, that the reference in clause 2 of the deed to certain items which are to be deducted from the "income of the settlor as computed for the purpose of the "Income Tax Acts" and are described as items "to be allowed "as deductions in computing total income for the purpose of "the said Acts" indicates that the income in question is something other than the total income which is the basis of the sur-tax assessment. I cannot myself attach any weight to the argument. The words are, in my view, directed solely to emphasising that in computing the income in question no regard is to be had to the diminution of it by the operation of the deed, but it is to be computed by deducting the items which the Acts regard as proper items of deduction to be made in reaching what may be called the figure of real income. I cannot accept the view that the words indicate that the income a fourth of which is to be paid over must be reached by some process other than the ordinary processes by which the income on which sur-tax is to be calculated is to be ascertained.

Counsel on both sides drew our attention in detail to many well known difficulties in the way of finding a completely logical context for the word "income" in the various contexts in which that word appears in the Acts. I trust that I shall not be accused of any disrespect to their interesting and careful arguments if I venture to observe that our task is to construe the deed and, fortunately, not to reconcile the various uses of the term "income" in the Acts.

I should mention one further point which emerged in argument. It was pointed out that the construction of the deed which was accepted—and, in my judgment, rightly accepted—by the Commissioners may place on the covenantor an obligation to pay to the trustee a sum measured as a part of a sum which he may not and probably will not, at all events at the time his obligation operates, have actually received. Such a consideration might no doubt have some weight in an ordinary case on the construction of doubtful words in a deed; but I cannot myself attribute any weight to it in the case of such a deed as the present, the function of which obviously is not to place any real burden on the covenantor, but merely to create an obligation to be used (no doubt, in a strict legal sense, quite legitimately) in reducing the covenantor's liability to taxation.

For these reasons, the order of Lawrence J. should, in my judgment, be reversed, and the decision of the Commissioners restored.

GODDARD L.J. It is, as I understand, conceded that if Mr. Payton was bound by his deed to pay to the trustee one quarter of the sum apportioned to him out of the income of Birmingham Criterions, Ld., under s. 20 of the Finance Act, 1922, as extended by s. 21 of the Finance Act, 1936, he is entitled to succeed in this appeal. The question that falls for decision is, therefore, one between the settlor and the trustee, and depends on the true construction of clauses 1 and 2 of the deed in question. The intention of the settlor has to be ascertained from the language of the deed, regard being had also to the surrounding circumstances. In my opinion, the deed itself shows that the settlor's intention was, in euphemistic language, so to order his affairs that the tax attaching under the appropriate Acts should be less than it otherwise would be. Reading clauses 1 and 2 together, the settlor covenanted to pay to the trustee an annual sum (subject to deduction of the tax at the standard rate) equal to a one-fourth part of his income as computed for the purpose of the Income Tax Acts less certain specified deductions. The word "computed" which frequently occurs in Acts relating to income tax is not a term of art. It means, according to the dictionary, "determined by calculation," and the computation or calculation determines the amount both for the purpose of income tax at the standard rate and also for the purpose of sur-tax which is an additional duty of income tax. In my opinion, the clear intention of the settlor is to pay to the trustee one fourth part of the income on which he is liable to be taxed, excluding the amount received by him as an underwriting member of Lloyd's. The computation of his income would include such part of the income of Birmingham Criterions, Ld., as had been apportioned to him. His return would show the total income from all sources and also the annual sums, annuities and interest which the Acts allow to be deducted, and the balance, less the amount of his earnings at Lloyd's, is the sum, a fourth part of which is to be paid to the trustee. Reliefs do not, in my opinion, come into the picture at all. They are not granted by way of deduction from the income returned, but by setting off the tax on the amount of relief granted against the tax otherwise payable. As the Acts provide that the income of the company which the Commissioners require to be distributed is to be deemed to be the income of the members of the company and make each member liable for sur-tax on the amount apportioned to him, in my opinion it follows that the apportioned amount is his income for the purpose of the Acts. I cannot see that the fact that the deed expressly refers to deductions of sums which in any case are allowed by law affects the matter in any way. The probable reason for referring to them is to make it clear that the sum earned at Lloyd's, which has to be expressly mentioned as otherwise it could not be deducted, is not to be the only deduction to be taken into account in calculating what is to be paid to the trustee, but that the settlor is to have the benefit of the statutory deductions as well. For myself I get no assistance from considering whether or not a wife's income would for this purpose have to be included in calculating the amount, nor is it necessary to decide it, as this matter is not raised by the case. Moreover, if a person who was minded to make such a settlement as that which we are now considering was married to a wife possessed of an income, I should expect that her income would be dealt with in the deed specifically. All we have to do is to determine the

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true construction of the deed which, in my opinion, is reasonably clear. I think the appeal should be allowed.

Appeal allowed.

Solicitors: *Marshall & Hicks Beach; Solicitor of Inland Revenue.*

H. C. G.

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THOMAS AND EVANS, LIMITED *v.* MID-RHONDDA CO-OPERATIVE SOCIETY, LIMITED.

Water—Overflow—Wall erected by riparian owner to protect his land and a highway—Removal of wall for re-erection—Escape of water through gaps—Damage to property of adjoining owner by flooding—No right of action.

Where a riparian owner for the protection of his own land erects a wall along the side of the river to prevent flooding and many years afterwards pulls down part of the wall in connection with building operations, with the result that a neighbour's property is damaged by flood, the neighbour has no right to the protection of the wall and cannot therefore maintain an action for damages on the ground of negligence, or nuisance, or on the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330.

Nitro-Phosphate & Odam's Chemical Manure Co. v. *London and St. Katharine Docks Co.* (1878) 9 Ch. D. 503 considered and distinguished.

So *held* by the Court of Appeal (Sir Wilfrid Greene M.R., Clauson and Goddard L.JJ.), reversing the decision of Judge Clark Williams.

APPEAL from His Honour Judge Clark Williams sitting at Pontypridd County Court.

By an agreement dated February 19, 1892, Mr. Idris Williams, who was the freehold owner of premises situated on a bank of the river Rhondda and fronting on Porth Street granted to the Ystradyfdwg Local Board (predecessors of the Rhondda Urban District Council) the right to erect a wall on his property along the river bank as a protection for his property and the highway from flooding; and he agreed that he would not at any time pull down or remove the wall or any part of it until he should previously have erected on the land buildings which would have the effect of preventing floods. Mr. Williams was to pay a proportion of the costs of erecting the wall. This wall was duly erected.

The defendants were tenants of the land in question and the shop premises thereon (but excepting the wall) as assigns of the premises for the residue of a term of 99 years for which the premises were demised to their assignor by a lease dated October 9, 1897. The plaintiffs were the owners and occupiers of neighbouring premises on the opposite side of Porth Street known as Porth Farm.

Early in 1939 the defendants became desirous of altering their existing premises and of erecting additional premises. For this purpose they wished to pull down part of the wall and to erect in its place a new wall to form a wall of the new building. On March 31, 1939, the defendants obtained from the successors in title of Mr. Idris Williams a consent to the alteration of the premises and the erection of additional premises as shown in the plans submitted for approval. The plans were also approved by the local council.

The defendants proceeded to carry out the work and by early in July a part of the wall had been pulled down and the wall of the new premises erected leaving at either end a small gap. These were being used by the workmen in carrying out the work. On the night of July 6, 1939, as the result of heavy rain, the river overflowed its banks through the gaps and after passing over the defendant's premises and the highway went on to and caused damage to the plaintiffs' premises.

In these circumstances the plaintiffs brought proceedings claiming damages, which were agreed at 100*l*., in respect of the injury to their premises. The plaintiffs alleged in their pleadings that the defendants owed a duty to the plaintiffs to maintain the wall and had removed a part of the wall in breach of their duty not to do any act in connection with the wall whereby the plaintiffs might be injured. They claimed further that by causing the water to flow on to the plaintiffs' premises, the defendants were guilty of trespass and guilty of negligence in permitting the water to escape and failing to take adequate steps to prevent the escape. They alleged further that the escape of the water constituted a nuisance and that defendants had wrongfully allowed the water to escape from their land on to that of the plaintiffs.

The county court judge said that the evidence was that on the evening of July 6 the river began to rise as the result of heavy rain and was at 5 P.M. when the workmen ceased work five to eight feet from the foot of the wall. He thought there had been remissness in leaving the place unattended for the night with the gaps open and it was during the night that the flooding occurred. The question then arose whether on this or any other ground the plaintiffs were entitled to succeed in their claim against the defendants. He was content to assume that the protection of persons in the position of the plaintiffs and of their property was not one of the purposes of the agreement of 1892, that the defendants were not bound by that agreement and that their obligation to their landlords under the lease imposed no duty on them towards the plaintiffs.

Yet there remained the question whether there was not a common law duty making it incumbent upon the defendants to take reasonable care in carrying out their operations to avoid causing unnecessary damage to their neighbours. On that question *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1) was clearly in point. Its effect was concisely stated in the notes to *Ashby* v. *White* (2) where it was said: "There is no common law duty on a frontager "to prevent the sea water from getting over his wall on to "his neighbour's land, and he is not liable to his neighbour for "neglect to top his wall, whereby his neighbour's land is "flooded; *Hudson* v. *Tabor* (3): "But it is otherwise where "he has interfered with the level of his own frontage and "thereby allowed the water to get through on to his neighbour's "land." He found nothing to suggest that this common law principle was restricted to the sea or tidal waters and applying it to the present case, he thought that the defendants with their knowledge of the risk of flooding in this neighbourhood and that the river wall had stood for many years as a protection in fact to all persons and property in their neighbourhood against flooding, were under a common law duty to their neighbours, including the plaintiffs, to take proper and sufficient precautions to avoid injury to such neighbours.

The plaintiffs could not succeed in their claim by prescription and any rights they might have on the ground of nuisance were no wider than those they had under the common law principle.

(1) (1878) 9 Ch. D. 503.
(2) (1703) 1 Smith's L. C. (13th ed.) 298, 299.
(3) (1877) 2 Q. B. D. 290.

He therefore gave judgment for the plaintiffs for 100*l.* damages and costs.

The defendants appealed. The appeal was heard on November 12, 13, 1940.

Comyns Carr K.C. (for *H. W. Shawcross K.C.*, on war service) and *Rowe Harding* (for *R. Gwyn Rees*, on war service) for the appellants.

The appellants were under no liability to the respondents for the damage from flooding, although they admitted that had they had any idea that the flooding would take place, they could have stopped up the gaps. The attempts to make them liable under the agreement of 1892 or by reason of some prescriptive right of the respondents failed before the county court judge; and his view that the appellants were liable on the basis of a common law duty to maintain the wall and to do nothing negligently that let the water through cannot stand.

First, there is no such duty at common law; and, secondly, there was no evidence of negligence. The fact that the appellants did not prevent the damage does not suffice to prove negligence. The evidence that no such rise in the river at that season had been known for many years shows that there was no lack of reasonable care. [On the question of whether there is any such common law duty as alleged they referred to *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1), *Hudson* v. *Tabor* (2), *Attorney-General* v. *Tomline* (3), *Rylands* v. *Fletcher* (4) and *West Norfolk Farmers' Manure Co.* v. *Archdale* (5).]

Sandlands K.C. and *Carey Evans* for the respondents.

What the appellants were authorized to do here was to pull down the part of the wall that was going to be rebuilt as part of their new building. In fact, however, they made gaps at either end of the authorized strip for convenience of working and it is through these gaps that the flooding took place. As to these gaps, they were wrongdoers and liable for the damage caused to the respondents by their trespass: *Jeffries* v. *Williams* (1). As occupiers of adjoining property the respondents were entitled to the protection of the wall.

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(1) 9 Ch. D. 503.
(2) 2 Q. B. D. 290.
(3) (1880) 14 Ch. D. 58.
(4) L. R. 3 H. L. 330.
(5) (1886) 16 Q. B. D. 754.

[GODDARD L.J. Unless the appellants were bound to keep up the wall for the respondents, what right of action would they have ?]

The right to be protected if a trespasser enters and causes damage: *Sedleigh-Denfield* v. *O'Callagan* (2). In any case the damage was greater than if the whole wall had been down because of the rush of water through the gaps.

[SIR WILFRID GREENE M.R. There is no evidence of this.]

The influx of water through the gaps was a wrongful interference with the respondents' rights. This action is justified on the grounds of nuisance and negligence and also on the principle of *Rylands* v. *Fletcher* (3). To leave gaps was a non-natural user of the appellant's property, the effect of which was to allow water to enter on the respondents' land and cause damage: *Rylands* v. *Fletcher* (3) therefore applies. Again the appellants were guilty of negligence in interfering with the de facto protection of the wall. This is apart from any question of trespass. The appellants ought to have known that the interference was likely to cause damage unless proper precautions were taken.

[GODDARD L.J. If a man builds a wall on his own property which happens to protect your property from flooding, what right of action arises if he pulls it down ?]

[SIR WILFRID GREENE M.R. The county court judge has made no finding of fact that the appellants were trespassers in pulling the wall down at the gaps.]

Then the respondents abandon that point.

Again the appellants have been guilty of nuisance in pulling down this wall without proper excuse.

[CLAUSON L.J. If this had been done by the owners of the wall, would there have been any right of action ?]

Not perhaps in nuisance.

[CLAUSON L.J. Then if this was done with the consent of

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(1) (1850) 5 Ex. 792.
(2) [1940] A. C. 880.
(3) (1868) L. R. 3 H. L. 330.

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the owners, there is equally no right of action in nuisance.] There is, however, a remedy based on negligence: see *Cunard* v. *Antifyre, Ld.* (1), and *Donoghue* v. *Stevenson* (2).

[They also referred to *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (3).]

[No reply was called for.]

Sir Wilfrid Greene M.R. In the action out of which this appeal arises the respondents, the plaintiffs, were seeking to recover damages from the appellants, the defendants, in respect of damage caused to their property by an incursion of water into it which came from the river Rhondda by way of the appellants' premises.

The appellants are lessees of land which stands upon the bank of the river Rhondda. The respondents own land at the back, there being between the two premises a street called Porth Street. It appears that the river Rhondda in the past has been liable to overflow and, in view of that circumstance and the damage and inconvenience caused to the highway of Porth Street an agreement was made on February 19, 1892, between Mr. Idris Williams, the then owner of the land now occupied by the appellants, and the local authority. That agreement provided for the grant to the local board of the right to erect a defensive wall upon the site specified in the agreement and described upon the plan. Various ancillary rights were given in the matter of repair and so forth, the cost of which was apportioned between Mr. Idris Williams and the board—and Mr. Idris Williams undertook not at any time thereafter to "pull down or remove "such wall or any part thereof unless and until he shall have "previously erected on the said land substantial buildings "which would have the effect of preventing floods or demand "or require the Board to pull down or remove such wall or "any part thereof." The object of the wall was two-fold. It would be a protection for the property of Mr. Idris Williams and also a protection for the highway. I need not refer in detail to the title of the appellants; they are by assignment the holders of a lease granted by a successor in title to Mr. Idris Williams.

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(1) [1933] 1 K. B. 551.
(2) [1932] A. C. 562.
(3) 9 Ch. D. 503.

In the year 1939 the appellants were minded to reconstruct certain buildings which existed on the site and in order to do that they proposed to get rid of part of the wall and substitute in its place the front wall of a building, which from the photograph, appears to be a two-storey building. That front wall would operate as a river wall in the same way as the wall constructed under the agreement of February, 1892, had done. The actual site of the original wall lay outside the boundary of the land comprised in the lease held by the appellants, and accordingly in order to carry out this part of their operations they required the consent of the freeholders who were their lessors, before they could interfere with the wall which did not lie on their premises or construct the building along the building line which they contemplated. Accordingly they obtained from the lessors' agent an authority in the following words: "On behalf of the lessors of the above "premises I hereby grant consent to the Mid-Rhondda Co-"operative Society, Ld., to make such alterations to the said "premises and the erection of additional premises as was "shewn by the plans submitted for my approval."

The plans in question show this particular new building along the line of the old wall. Now, in terms, that is a licence that, for all practical purposes, had the effect of throwing that part of the strip of land on which the wall was built into the lease which the appellants held. The appellants proceeded to start their operations and in the course of them they pulled down a length of wall. They started to erect the front wall of their new building which was slightly smaller in extent than the actual stretch of wall which they had demolished. I think the demolition extended on the one side some 2 ft. 6 ins. beyond the actual line of the new building, and a few inches on the other side. Their plan was, of course, to fill up those gaps by building a wall across them, but at the relevant time, when the events occurred giving rise to the present claim, they had not actually filled up those gaps by erecting the little bit of wall necessary for the purpose; they had used the gaps in the course of their building operations to pass materials through on to the bit of land lying between the actual edge of the water at that season and the new building itself.

Unfortunately, on the night of July 6, 1939, the river Rhondda, as the result of very exceptional rains, was swollen; it rose very rapidly during the night and penetrated through the gaps which existed at the sides of the new building. Thence it reached the yard in the appellants' premises, and from there it crossed the road and came into the respondents' land where it did the damage which is complained of.

In those circumstances the present action was launched and it resulted in a judgment for the respondents for the sum of 100*l.*, a figure as to which there is no dispute. The learned county court judge took the view that, by leaving those gaps in the course of their operations, the respondents had been guilty of negligence, because apparently they ought to have so arranged their operations as to leave a protection at those points which would prevent the flood water, if it should come, from getting in to the land at the back. He found that, upon the evidence before him, the sudden rise in the river was a thing which ought in reason to have been anticipated and precautions ought to have been taken to deal with it.

The learned judge was, in my opinion, wrong in the decision to which he came. The fault in his judgment, if I may so describe it without disrespect to him, because it is a matter to which he had obviously given very careful attention and consideration, lies in the fact that at the outset he set himself to examine the conduct of the appellants without considering what is vital in matters of negligence, the right, if any, of the respondents to call for the exercise of the measure of care which he found was appropriate to the situation.

If he had approached the matter from that angle, I cannot help thinking that he would have seen at once how very far-reaching was the decision to which he was coming. At the outset it is abundantly clear, and the learned county court judge took the same view, that the agreement between Mr. Idris

Williams and the local Board was not a thing which could, on any view, confer any right whatsoever upon the respondents. So far as they were concerned it was res inter alios acta creating mutual rights and obligations between the parties to the agreement, and their respective successors, but not enuring for the benefit of any third person at all. It was therefore impossible for the respondents to base any claim upon that document, and Mr. Sandlands, who appeared for the respondents before us, did not attempt to do so.

That being the position, the case can be conveniently considered by taking, first of all, the position as it would have been if the demolition of the wall had been carried out by the freeholder, he being, for the purposes of this consideration, in occupation of the premises. The wall had been constructed upon his land under an agreement with the local Board, under which they were entitled to object to his removing it. He agrees with the local Board that for certain purposes he shall be entitled to remove it, and he does remove it. What right can that possibly give to the respondents? They had no right to call upon Mr. Idris Williams or anybody else to erect a wall upon this land for the purpose of protecting their property. If Mr. Idris Williams, for his own purposes, with or without the assistance and co-operation of the local Board, chooses to erect such a wall, on no principle of law known to me would a third person be entitled to insist on its continued existence. If this wall had been erected by the freeholder and taken down by the freeholder the next day, or a week, or a year afterwards, with the result that the flood water took the course which it would have taken if the wall had never been there, I cannot see, on any principle known to me, that the respondents would have been entitled to complain. If it were not so, a person, in putting up a defensive work on his own land, would act at his peril, because by the mere fact of erecting it he would be conferring upon his neighbours, or persons in the neighbourhood, rights to insist that he should never remove the wall or building that he had put up. Such a doctrine, in my opinion, finds no support in any principle of our law. If the learned county court

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judge had considered the implications of his decision and had approached the matter from the angle of the rights of the respondents, rather than from the angle of the alleged carelessness of the appellants, I cannot help thinking that his decision would have been different from what it was.

Then it is said that the taking down of that part of the wall where the gaps in question existed was not an act done by a freeholder or by a person lawfully entitled to do those acts, but that the appellants, in taking down those bits of wall, were really acting as trespassers. The ground upon which that argument is based is the suggestion that the licence of March 21, 1939, which I have read, did not, upon its true construction, read in relation to the plans and applied to the actual operations of the appellants, extend to the taking down of those bits of the wall which, as I have already pointed out, were beyond the actual area covered by the wall of the new building.

Now, a case of that kind, if indeed its establishment would have altered the position, was one which ought to have been pleaded and ought to have been supported by evidence. Nothing that I say is to be taken as expecting, in cases such as these, any undue attention to the form of pleadings, but in the present case I take note of this fact, that no such case was made at the trial; there is not a suggestion from beginning to end of the learned county court judge's judgment that any such suggestion was made, and there is no finding of fact by him—and findings of fact would have been necessary—which bears upon the matter. Indeed, if the language which he uses in relation to these gaps at the outset of his judgment is read in its normal and obvious sense, he is quite clearly treating the whole of the demolition of the wall which was carried out by the appellants as something which they were doing in the proper execution of their work and in accordance with the terms of their licence. Accordingly, in my opinion, that point is one upon which the respondents cannot rely.

I may add that it seems to me that had they wished to put forward a case of that kind at the trial, they would have had very great difficulty in doing it, because a licence of this sort must obviously extend to any normal and reasonable building operation which was required for the purpose of carrying into effect the works shown on the plans referred to. Nothing that I have heard in the course of this case suggests to me that, from the point of view of construction, anything done by the leaving of those gaps was in any way unreasonable or outside the reasonable meaning of the licence. That being so, the appellants must be treated in this case as persons who, with the licence of the freeholder, the owner of the wall and the owner of the site of the wall, have removed that wall or part of it, and they stand in precisely the same position as the freeholder himself. The respondents have no more right to complain of the action of a licensee of the freeholder in taking down that wall, or part of it, than they would have had to complain if the freeholder had done it himself. So much for the case as based on negligence.

Mr. Sandlands before us also endeavoured to rest his case upon the well known principles of *Rylands* v. *Fletcher* (1) and upon nuisance. In my opinion neither of those grounds is open to him. The argument as based on *Rylands* v. *Fletcher* (1) involved the proposition that in taking down those portions of the wall and so creating these gaps the appellants were doing something which was a non-natural user of their land, the effect of which was to allow the river water to enter the land and thence to escape on to the respondents' land. This proposition, when analysed, really contains precisely the same defect as the argument based on negligence, because it is asserted that the removal of a wall which has been built by the owner of property on his own land for his own purposes is a non-natural user of his land. The only ground for saying that it was a non-natural user is that the particular " user " would damnify, or might damnify, the respondents. That again implies that the respondents had got some right to complain of this particular user of the land ; in other words, that the wall, having once been erected, they would be entitled to interfere with any subsequent operations which had the effect of removing their protection. That is all I propose to say on that branch of the argument.

(1) L. R. 3 H. L. 330.

In the argument based on nuisance Mr. Sandlands submitted that the appellants, in pulling down this wall without proper excuse, caused water to flow on to their own premises, which ought not to have been there, whence it escaped to the damage of the plaintiffs. He said that the presence of the gap was an artificial work, and by means of that artificial work water was allowed to escape in the way that it did. I am afraid that the conception of these gaps as artificial works is one which my mind is unable to grasp. The assertion that the appellants pulled down the wall unlawfully, that is to say, in its broader meaning, without proper excuse, really begs the whole question. Mr. Sandlands also used the word "unlawfully" in a narrower sense, that is to say as meaning that the appellants exceeded the terms of their licence and therefore committed a trespass, which is what he contended in his argument on the question of negligence. I have already dealt with that and I do not propose to add anything to what I have already said, but why the pulling down of the wall was in the broader meaning of the term unlawful, I am afraid I am unable to appreciate. Mr. Sandlands endeavoured to suggest that the existence of these gaps, or the existence of what was left of the wall, or rather, what took the place of the wall, coupled with the gaps, had in some way caused the flood water to flow in a direction, or volume, in which it would not otherwise have flown. He suggested that the real complaint might be that the appellants had placed an artificial obstruction, or maintained an artificial obstruction, on the banks of the river consisting of the front of their new buildings which, when taken in conjunction with the gaps, caused water to flow in a way in which it would not otherwise have flown. If any such case could have been made, it would have been a case on which evidence would have been required. It was not suggested that there was a particle of evidence in support of it, and it would be quite impossible for this Court, or any other court, to decide a matter which is fundamentally a matter of fact without having the necessary evidence before it. I accordingly dismiss that point.

Mr. Sandlands, in the course of his argument, referred to a range of authorities, stretching from *St. Helens Smelting Co.* v. *Tipping* (1) to *Donoghue* v. *Stevenson* (2), and from *Rylands* v. *Fletcher* (3) to *Sedleigh-Denfield* v. *O'Callaghan* (4). I do not find in the general observations which he culled from some of the judgments and opinions in those cases anything which assists me to accept any of his arguments. The general observations in question must, of course, be read in the light of the facts of the cases to which they related. As it seems to me, the simple ground for deciding this case is that the respondents had no right to have the wall erected, they had no right to insist on its continuance, they had no ground of complaint whatsoever against anybody who rightfully took it down, and the appellants in this case rightfully took it down under their licence from their freeholder.

There is one other matter to which I should refer. The learned county court judge placed great reliance on a case in this Court of *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (5). That was a case which related to a tidal river. There had existed a sea wall which was, if not put up, at any rate, maintained, under the jurisdiction and directions of a Board of Commissioners and that Board had prescribed a height of four feet two inches as the minimum height for the wall. There is no question but that the Commissioners had jurisdiction and power so to prescribe, and anyone who removed that wall, or reduced its height, with the result that private persons were injured in their property, would be liable to an action. The Dock company, in point of fact, obtained a private Act of Parliament under which their docks were constructed, and they made a cut in the wall and led the river and tidal water into a basin which they constructed at the back. The height of the walls which they put up was insufficient to keep out a particularly high tide, and was, I think, even lower than the four feet which the private Act prescribed, and certainly lower than the four feet two inches which the Commissioners had prescribed for the sea wall, part of which they had taken down in connection with their works. The decision in that case was based, in the first instance, on the legislative provision and the directions of the Commissioners, but there are certain observations in the course of the judgment which suggest that quite apart from those matters there would have been a liability at common law upon the defendants, the Dock company, for removing the wall and not providing a proper substitute for it. I find those observations difficult to follow, but it has to be remembered that the case with which this Court was dealing there was the case of a tidal river. In the case of tidal rivers, the Crown had the prerogative right, and indeed, the duty, to protect the realm against incursions of the sea. That was a duty which lay upon it and which it performed for the benefit of the King's subjects. The execution of that duty came to be transferred to Boards of Commissioners, and I apprehend that if the King, or the Commissioners, duly acting, erected a wall, or required the erection of a wall, for the general protection of the public, and some person, without just excuse, removed the wall, with the result that members of the public had their property damaged, an action would lie at common law against the person who did that act. It may be that the references to a right of action at common law relate to that aspect of the matter. I find it difficult, as I have said, to see exactly what the common law claim was thought to be, but, however that may be, after very carefully considering the judgment in that case I can find nothing in it which affords support for the proposition that where the riparian owner of land on a non-tidal river erects a wall for his own purposes, for the protection of his own land, a person owning land behind him is entitled to require that he shall never thereafter remove it, or any part of it.

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(1) (1865) 11 H. L. C. 642.
(2) [1932] A. C. 562.
(3) L. R. 3 H. L. 330.
(4) [1940] A. C. 880.
(5) 9 Ch. D. 503.

In the result, the appeal succeeds, with costs here and below.

CLAUSON L.J. I find myself in complete agreement with the result reached in the judgment of the Master of the Rolls and in the steps by which the result is reached, and I therefore propose to add nothing, except to thank Mr. Sandlands for an

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argument which I personally found most interesting and stimulating.

GODDARD L.J. I agree.

Appeal allowed.

Solicitors: *Smith, Rundell, Dods & Bockett, for Morgan Bruce & Nicholas, Pontypridd; Helder, Roberts & Co., for W. R. Davies & Co., Pontypridd.*

H. C. G.

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IOSSIFOGLU *v.* COUMANTAROS.

Arbitration—Reference—When arbitrators enter upon reference—Disagreement between arbitrators—Appointment of umpire by Court—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 5.

A contract of sale contained an arbitration clause which provided that " should any dispute arise between the sellers and buyers " under this contract, the same shall be referred to persons in " London, one to be appointed by each of the parties hereto. In " case the arbitrators so appointed disagree they shall appoint an " umpire." A dispute arose between the sellers and buyers and each of them appointed an arbitrator. One of the arbitrators repeatedly endeavoured to arrange a meeting with the other, but the latter failed to arrange such a meeting. The arbitrator then unsuccessfully endeavoured to obtain the consent of the latter to the appointment of an umpire. Application was then made to the Court for the appointment of an umpire under s. 5 of the Arbitration Act, 1889 :—

Held, by the Court of Appeal that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference. The Court were entitled to appoint an umpire under s. 5 of the Arbitration Act, 1889, as there had been a disagreement between the arbitrators.

APPEAL from a decision of the Divisional Court.

On March 13, 1939, Nicholas S. Coumantaros and others, owners of seventy-six per cent. of the Greek steamer *Ekaterini Coumantarou*, entered into a contract in writing to sell for the sum of 18,620*l.* that share in the ownership of the vessel to the nominees of P. Wigham Richardson & Co., to be later declared. Ten per cent. of the purchase money was paid, the balance was to be paid in cash in London within four business days of the vessel being ready for delivery in exchange for a legal bill of sale.

By a clause in the contract should " any dispute arise "between the sellers and buyers under this contract, the "same shall be referred to persons in London, one to be "appointed by each of the parties hereto. In case the "arbitrators so appointed disagree, they shall appoint an "umpire. The decision of the arbitrators or umpire shall be "accepted as final and binding upon the parties hereto, and, "for the purpose of this contract, may be made a rule of "Court. The arbitrators and umpire are to be commercial "men and not lawyers."

The Greek Government on September 14, 1939, by decree, prohibited the sale of Greek ships to aliens. On September 26, 1939, P. Wigham Richardson & Co. gave notice to the sellers that the nominal buyer was a Greek subject named S. H. Iossifoglu.

On January 10, 1940, Iossifoglu served a notice upon the sellers alleging that a dispute had arisen between the parties and that he nominated Mr. W. Netherton Johnson to act as his arbitrator, and he called upon the sellers to nominate their arbitrator.

In February, 1940, the sellers commenced an action in the Greek Courts against the buyers and their nominee, claiming a declaration that the contract of sale was null and void on the grounds that Iossifoglu was a mere nominal purchaser and that by the above mentioned decree of the Greek Government it had become impossible to carry out the contract. They alleged that the value of the seventy-six per cent. share of the vessel was by reason of the European war then 150,000*l.* at the least.

On March 5, 1940, the sellers appointed Mr. H. C. Brewer as their arbitrator, but without prejudice to the pending litigation in Greece and to their contention that the contract had been cancelled and subject to proof that Iossifoglu was the original nominee appointed under the contract of sale.

On April 4, 1940, the action at Athens which had come on for hearing was adjourned at the instance of Iossifoglu that he might obtain documents in London, without which he was unable to proceed.

Mr. W. Netherton Johnson, the buyer's arbitrator, swore in his affidavit that he had repeatedly endeavoured to arrange a meeting with Mr. Brewer, the sellers' arbitrator, for the purpose of discussing the case; that Mr. Brewer had failed to agree to arrange such a meeting and that the two arbitrators had been unable to agree on the course of procedure to be adopted in the arbitration. Accordingly, he had suggested to Mr. Brewer that they should appoint an umpire to whom they

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should apply for directions. Mr. Brewer had not agreed to the appointment of an umpire.

Mr. Brewer, the sellers' arbitrator, swore in his affidavit that as documents were required by both parties for the litigation in Greece it was undesirable for the arbitrators to meet.

Iossifoglu having on April 12, 1940, served a notice upon the two arbitrators calling upon them to appoint an umpire within seven days pursuant to sect. 5 of the Arbitration Act, 1889 (1), and no umpire having been so appointed, then took out a summons before the Master, applying to the Court to order the appointment of an umpire.

The Master, on May 28, 1940, dismissed the application and refused to appoint an umpire.

Iossifoglu appealed to the Judge in Chambers, and on June 4 Cassels J. affirmed the decision of the Master and dismissed the appeal.

In October the Court at Athens, whilst accepting the principle that the contract for preliminary sale was cancelled, decided by a majority of two to one that by reason of the arbitration clause in the contract they were incompetent to decide the case.

The buyers appealed from the decision of the Judge in Chambers to the Divisional Court, and that Court, on October 31, 1940, allowed the appeal, reversing the decision of the Judge in Chambers and ordered the appointment of an umpire.

The judgments of the Divisional Court were as follows:—

VISCOUNT CALDECOTE C.J. There is, as we have been informed in one of the affidavits, a dispute here between the parties to the contract, but the information contained in the affidavits does not enable us to say whether the dispute arises under the contract. It may be that the real dispute or at any rate the first dispute between the parties is whether the contract is or is not in existence. But there is a dispute, and if the dispute arises under the contract the arbitration clause applies. Mr. Brewer, one of the arbitrators, says that there is no dispute that arises under the contract, because there is no contract in existence; it has, he says, been cancelled. Mr. Netherton Johnson, on the other hand, says that there is a dispute under the contract, and in these circumstances I think that there is a disagreement between the arbitrators.

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(1) Arbitration Act, 1889, s. 5: "In any of the following cases . . . . "(*c*) Where the parties or two "arbitrators are at liberty to "appoint an umpire or third "arbitrator and do not appoint "him; . . . . any party may "serve . . . . the arbitrators . . . . "with a written notice to appoint "an . . . . umpire . . . . If the "appointment is not made within "seven clear days after the "service of the notice, the Court "or a judge may, on application "by the party who gave the "notice, appoint an . . . . umpire ". . . . who shall have the like "powers to act on the reference "and make an award as if he had "been appointed by consent of "all parties."

Counsel for the sellers originally suggested when considering this submission that disagreement differs from non-agreement. In my opinion, the failure to agree is a disagreement, and, in the circumstances related to us, I think that the arbitrators should have agreed to appoint an umpire. What exactly the question for the umpire will be I am not in a position to say: it may well be that the first question that he will have to decide is whether there is anything for him to settle under the contract; but the question we have to decide is whether, in view of the arbitration clause—it being admitted by counsel that both arbitrators have been validly appointed—that state of affairs has arisen which requires the arbitrators to appoint an umpire. In my opinion, the arbitrators have differed, and there has been a disagreement between them. An umpire should be appointed to deal with the question in dispute between the parties.

HAWKE J. Although I feel some hesitation in the matter, I think the course adopted by the Court may be the more convenient.

HUMPHREYS J. Each party is represented by a firm of solicitors of experience, and it is now agreed that each firm of solicitors concurred in the appointment of an arbitrator in respect of a dispute which it was suggested had arisen under the contract. One of the arbitrators thus appointed declined to act for the present. The result was that the other arbitrator

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was left alone, and he had by himself no power to do anything at all. It is said here, and it may be so for all I know, that the reason why one of the arbitrators refused to act was that he took certain views as to the contract, from which it would seem to follow that he had seen the contract and considered it. Whatever his position may be there was here, in my opinion, a disagreement between these two arbitrators. In view of the terms of the arbitration clause, I can see no reason why these arbitrators should not have appointed an umpire, and as the Arbitration Act, 1889, provides for the state of affairs where an umpire should be appointed, I think the appellant is right in his contention that the Court should appoint an umpire.

The sellers appealed. The appeal was heard on December 5, 1940.

Cecil Havers K.C. and *A. J. Hodgson* for the appellants. There cannot be a "disagreement" within the meaning of the submission unless and until the arbitrators have entered upon the reference, and that does not take place until the arbitrators have met and discussed matters. The endeavour to fix a date for entering upon a reference is a preliminary step to the reference, and is not an entering upon a reference. There is a distinction between an arbitrator accepting office and his entering upon a reference. An arbitrator does not enter upon a reference when he accepts the office of arbitrator. Until the Arbitration Act of 1934 was passed there was no power to deal with a case where an arbitrator refused to use despatch in entering upon an arbitration or in making an award. This state of affairs was remedied by s. 6 of that Act. Both the Master and the Judge in Chambers considered that the proper procedure to adopt in this case was to proceed under that section.

Stephen Murray for the respondent was not called upon.

Scott L.J. In this case a question has arisen as to the appointment of an umpire pursuant to the provisions of s. 5 of the Arbitration Act, 1889, under an arbitration clause contained in an agreement. The question raised by the appeal really resolves itself into this: When can arbitrators be said to enter upon a reference? In my view, they enter upon it as soon as they have accepted their appointment and communicated with each other about the reference. That was the view taken by the Divisional Court in the present case, reversing a decision of Cassels J., who had affirmed a decision of Master Moseley. I am in agreement with the view taken by the Divisional Court, and particularly with the reasons stated by Humphreys J. I think that in this case in the position that had arisen the Court was entitled to appoint an umpire under s. 5 of the Arbitration Act, 1889, for the reasons there stated; and I do not think it necessary to add anything further.

MACKINNON L.J. I agree.

LUXMOORE L.J. I also agree.

Appeal dismissed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondent: *Ince, Roscoe, Wilson & Glover.*

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19.

OCEAN STEAMSHIP COMPANY, LIMITED *v.* QUEENSLAND STATE WHEAT BOARD.

Practice—Writ—Service out of jurisdiction—Contract for carriage of goods from Australia—Provision that Australian Sea Carriage of Goods Act, 1924, *should apply to contract—Anything in contract inconsistent with the Australian Act to be null and void—Provision in Australian Act that parties shall be deemed to have intended to contract according to laws in force at place of shipment—Provision in contract that the contract shall be governed by law of England—R. S. C., Order* XI., *r.* 1 (*e*), (*iii.*).

The plaintiffs contracted with the defendants to carry a quantity of wheat from Brisbane in Australia to Liverpool and Glasgow. The bills of lading provided in clause 1 that all the terms, provisions and conditions of the Australian Sea Carriage of Goods Act, 1924, were to apply to the contract and that anything contained in the contract which was inconsistent with that Act should be null and void. Clause 16 of the bill of lading provided that the contract should be governed by the law of England. Sect. 9 of the Australian Act provides that the parties to a contract relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the law in force at the place of shipment and any stipulation or agreement to the contrary shall be null and void. The shipowners alleged that the defendants had shipped wheat in a dangerous condition so that it had contaminated other goods and they claimed damages from the shippers of the wheat. They applied for leave to serve a writ out of the jurisdiction under Order XI., r. 1 (*e*), (iii.), on the ground that the contract was governed by English law:—

Held, by the Court of Appeal that as the parties had incorporated into the bill of lading all the terms, provisions and conditions of the Australian Act, they had incorporated s. 9, and that therefore clause 16 of the bill of lading which provided that the contract should be governed by the law of England was null and void, as being inconsistent with s. 9 of the Australian Act, and therefore the necessary condition to the granting of leave for service out of the jurisdiction had not been fulfilled.

Decision of Stable J. affirmed.

APPEAL from a decision of Stable J. sitting at Chambers.

The plaintiffs, the Ocean Steamship Company, Ld., were a company incorporated with limited liability under the English Companies Acts, and were domiciled in England.

The defendants, the Queensland State Wheat Board, were a corporate body domiciled in Australia, and therefore outside the jurisdiction of the English courts.

The plaintiffs entered into three contracts with the defendants for the carriage of a large number of bags of wheat by the steamship *Nestor*, a vessel belonging to the plaintiffs, from Brisbane in Australia to Liverpool or Glasgow. The contracts were contained in three bills of lading each dated May 17, 1939. The bills of lading, so far as material, were in identical terms, and contained the following provisions: Clause 1: "All the "terms, provisions and conditions of the Australian Sea "Carriage of Goods Act, 1924, and the Schedule thereto, are "to apply to the contract contained in this bill of lading, and "the carrier is to be entitled to the benefit of all privileges, rights "and immunities contained in such Act and the Schedule thereto "as if the same were herein specifically set out. If anything "herein contained be inconsistent with the said Act and Schedule "it shall, to the extent of such inconsistency and no further, be "null and void." Clause 16: "The contract evidenced by this "bill of lading shall be governed by the law of England."

The bags of wheat were shipped by the defendants at Brisbane in due course, and were duly discharged as to part at Liverpool and as to the remainder at Glasgow. The plaintiffs alleged that the wheat when it was shipped was infested with weevils, and consequently fell within the description "dangerous goods" within the meaning of art. iv., r. 6, of the Schedule to the Australian Sea Carriage of Goods Act, 1924. They further alleged that the wheat so infested caused damage to certain parcels of flour shipped by other shippers on board the same ship, and that in consequence they had been obliged to pay damages to the owners of the flour and had incurred expenses. The plaintiffs claimed that the defendants were liable to indemnify them against those damages and expenses.

As the defendants were domiciled in Australia the plaintiffs applied to the District Registrar at Liverpool for leave to serve a writ out of the jurisdiction pursuant to Order XI., r. 1 (*e*), (iii.) (1).

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(1) R. S. C., Order XI., r. 1 (*e*), (iii.): "Service out of the juris- "diction of a writ of summons ". . . . may be allowed by the "Court or a judge whenever . . . . "the action is one brought against "a defendant . . . . to recover "damages . . . . for . . . . the "breach of a contract . . . . by "its terms or by implication to "be governed by English law."

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The District Registrar, by an order dated April 12, 1940, gave leave to issue a writ of summons and to serve it out of the jurisdiction. The plaintiffs issued the writ on the same day.

On June 28, 1940, the solicitors for the defendants accepted service of the writ and undertook to enter an appearance in due course.

On September 4, 1940, the solicitors for the defendants entered a conditional appearance "without prejudice to an "application (1.) to set aside the writ and service of the writ, "and (2.) to discharge the order authorising such service."

The defendants duly made an application to the District Registrar to set aside the writ and the service of the writ, and on September 23, 1940, the District Registrar dismissed the application.

The defendants appealed to the judge in Chambers, and on October 24 Stable J. allowed the appeal, and set aside the order for service of the writ out of the jurisdiction.

The plaintiffs appealed. The appeal was heard on Dec. 16, 17, 19, 1940.

A. T. Miller K.C. and *H. I. Nelson* for the appellants. By Order XI., r. 1 (*e*), (iii.) of the Rules of the Supreme Court service out of the jurisdiction may be allowed if the contract by its terms is to be governed by English law. The contract in the present case contains in clause 16 an express stipulation to that effect, and it is the paramount clause of the contract. That clause is said to be inconsistent with the Australian Sea Carriage of Goods Act, 1924 (1), and, therefore, under clause 1 of the contract, null and void. But it is not inconsistent with that statute. The effect of clause 1 is that the Australian

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(1) Australian Sea Carriage of Goods Act, 1924, s. 9, sub-s. 1: "All parties to any bill of lading "or document relating to the "carriage of goods from any "place in Australia to any place "outside Australia shall be "deemed to have intended to "contract according to the laws "in force at the place of shipment, "and any stipulation or agreement "to the contrary, or purporting "to oust or lessen the jurisdiction "of the Courts of the Common-"wealth or of a State in respect "of the bill of lading or document, "shall be illegal, null and void, "and of no effect."

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Act is incorporated into the contract: *Vita Food Products Inc.* v. *Unius Shipping Co.* (1), and s. 9 of the Australian Act says that the parties to the contract are to be deemed to have contracted according to Australian law. There is no inconsistency here. The task of the English court would be to interpret the contract on the assumption that the parties intended the law of Australia to apply, and the English court would declare that law, proved before it as a matter of fact. In *Dobell & Co.* v. *Steamship Rossmore Co.* (2) Lord Esher M.R. said: "They then introduce into their bill of lading the words "of the Harter Act, which I decline to construe as an Act, but "which we must construe simply as words occurring in this "bill of lading." The words of the Australian Act of 1924 must be construed in a similar manner as part of the present contract. The questions as to the jurisdiction of the English and of the Australian courts are distinct, and nothing in the appellants' contentions seeks to oust the jurisdiction of the Australian courts. There may be jurisdiction in both courts. The English courts would give effect to the Australian Act which is incorporated into the contract, and there is nothing in Australian law which makes it impossible that a contract should be made in Australia which is to be governed by English law. In fact, both laws are the same, but that fact is irrelevant. In *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (3) Lord Atkin said: "The "legal principles which are to guide an English court on the "question of the proper law of a contract are now well settled. "It is the law which the parties intended to apply. Their "intention will be ascertained by the intention expressed in "the contract, if any, which will be conclusive." That intention is clearly expressed in clause 16. If the plaintiffs recover judgment they will have to run the risk that the Australian courts will refuse to give effect to it.

This is a proper case in which leave to serve the writ out of the jurisdiction should be given. The whole of the plaintiffs' evidence and some of the defendants' is in this country.

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(1) [1939] A. C. 277.
(2) [1895] 2 Q. B. 408, 413.
(3) [1937] A. C. 500, 529.

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Logan v. *Bank of Scotland* (*No.* 2) (1) and *The Torni* (2) were also cited.

F. A. Sellers K.C. and *G. G. Blackledge* for the respondents. The decision of the judge in chambers in setting aside the writ and the service of the writ out of the jurisdiction was correct. The application by the plaintiffs for leave to serve the writ out of the jurisdiction was made under R.S.C., Order XI., r. 1 (*e*), which provides that "service out of the jurisdiction of a writ "of summons or notice of a writ of summons may be allowed "by the Court or a judge whenever . . . . (*e*) The action is "one brought . . . . to enforce . . . . a contract or to recover "damages or other relief for or in respect of the breach of a "contract . . . . (iii.) by its terms or by implication to be "governed by English law. . . . ." But it is provided by r. 4 of that Order that "no such leave shall be granted unless it "shall be made sufficiently to appear to the Court or judge "that the case is a proper one for service out of the jurisdiction "under this Order." Where English law is to be applied the proper court to apply it is an English court. It would be very curious if the rule were applied in a case where the law to be applied was the law of Australia. That would be contrary to the spirit of the rule. Certain observations on the construction of the rule were made in *Johnson* v. *Taylor Bros. & Co.* (3). Lord Haldane there said (4): "Order XI., r. 1, does not lay down "in imperative terms a new principle of law as to be applicable "in all cases. What it does is, while leaving intact the old "principle that by the law of England jurisdiction depends, "broadly speaking, on presence within the jurisdiction, to "enable the Court to give special leave for service out of the "jurisdiction in certain circumstances. The Court may do "so, that is to say that the Court has a new power which it is "enabled to exercise in particular cases which seem to it to "fall within the spirit as well as the letter of the various "classes of case provided for. This appears to me to entitle "the Court to refuse to give such leave in an instance in which "the proceeding, though for a breach within the jurisdiction

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(1) [1906] 1 K. B. 141.
(2) [1932] P. 78.
(3) [1920] A. C. 144.
(4) Ibid. 153.

"and in the letter within the terms of the rule, is in substance "not so." Lord Dunedin also said (1): "Now service being "the foundation of jurisdiction, it follows that that service "naturally and normally would be service within the jurisdiction. But there is an exception to this normal rule, and that "is service out of the jurisdiction. This, however, is not "allowed as a right but is granted in the discretion of the "judge as a privilege, and the rule in question here prescribes "the limits within which that discretion should be exercised. "The spirit of the rule I take to be that, when what the "plaintiff wishes really to complain of is the non-performance "of something which the defendant ought to have performed "within the jurisdiction according to the proper interpretation "of the contract, he should be allowed to try that question "here, notwithstanding that there might be some other acts "which the defendant ought to have performed abroad. It "seems to me to follow that there must be substance in the "breach."

[*A. T. Miller K.C.* The rule has been altered since that decision.]

The sum total of the rights of the plaintiffs is to be found in Order XI. and within the spirit of the rule. The question is whether this is a contract which by its terms or by implication is to be governed by English law. According to the decision of Lord Esher M.R. in *Dobell & Co.* v. *Steamship Rossmore Co.* (2) what the Court has to do is to construe the contract reading into it as if they were written into it the words of the Australian Sea Carriage of Goods Act, 1924, at length, not merely the Schedule to the Act, but the whole Act including s. 9. Under that section the parties to the contract shall be deemed to contract according to the laws of the place of shipment, namely, Brisbane, and any contract to the contrary effect shall be null and void. If effect were given to the contention put forward on behalf of the plaintiffs it would lead to the topsy-turvy result that though the law governing the contract is English law yet the law to be applied is Australian law.

(1) [1920] A. C. 154.

(2) [1895] 2 Q. B. 408, 412.

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In any event even if the court should take a contrary view, nevertheless the court in its discretion ought not to give the plaintiffs leave to serve the writ out of the jurisdiction. If the law which has to be applied is Australian law that is a ground for saying that this is not a proper case for service of the writ out of the jurisdiction. Secondly, the Australian courts would be the more convenient forum in which to try the case. In *Rosler* v. *Hilbery* Russell J. said (1): "Even then, "the Court has in such matters a discretion, and one of "the matters which the Court properly entertains in coming "to a conclusion as to whether or not it should exercise "the discretion is, which is the forum conveniens." The Master of the Rolls also said (2) that "in deciding whether "or not it will exercise its discretion the Court . . . . would "pay attention to what is the forum conveniens." The main issue to be tried in the case is not damages, but breach of contract, and on the balance of convenience that issue could more properly be tried in Australia. When the parties went before the Registrar in order to obtain leave to serve the writ out of the jurisdiction, the plaintiffs ought to have made a full and fair disclosure of the facts and to have put on affidavit the terms of the Australian statute. This, however, although very material, was not done, and that is a ground for the court exercising its discretion by refusing to give leave to serve the writ out of the jurisdiction: see *The Hagen* per Farwell L.J. (3).

A. T. Miller K.C. in reply. There is no ground for the allegation that there was a suppression of material facts by the plaintiffs. *Rosler* v. *Hilbery* (1) was a case in which it was desirable that the proceedings should go on in the Belgian courts and not in the English courts. That was made quite clear in the judgment of Sargant L.J. (4). That case has no bearing upon a case in which English shipowners have carried goods in their ship from Australia to England and who allege that the shippers shipped dangerous goods. The plaintiffs' claim is for damages owing to the contamination of other cargo by this dangerous wheat. A British subject who brings himself within the terms of this rule is entitled, according to the authorities, to have his claim decided by an English court. Wherever the case is tried it will be inconvenient for one of the parties. There is no similar provision in the English Carriage by Sea Act to s. 9 of the Australian statute. The parties to the contract contracted that the contract should be governed by English law. Effect would be given to s. 9 of the Australian statute in the Australian courts, but effect would not be given to it in the English courts. Paramount authority cannot be given to s. 9 of the Australian statute, but it is to be read side by side with clause 16 of the contract, and effect given to both. The clauses are not mutually antagonistic. Effect can be given to both clauses by saying that the contract is to be governed by English law, but in construing the contract Australian law is to be applied.

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(1) [1925] Ch. 250, 254.
(2) Ibid, 259.
(3) [1908] P. 189, 201.
(4) [1925] Ch. 263.

Cur. adv. vult.

1940. Dec. 19. The following judgments were read.

MacKinnon L.J. This is a difficult case, which raises an important question. The plaintiff company are owners of the steamship "*Nestor.*" The defendant board shipped on that vessel at Brisbane parcels of wheat under various bills of lading. According to the plaintiffs' case that wheat on the voyage became infested with weevils; and the weevils so produced caused damage to bags of flour shipped by other shippers. The plaintiffs have had to pay damages to the owners of the flour, and have incurred expenses. They claim that the defendants are liable to indemnify them against these damages and expenses, in that the defendants committed a wrong to them in shipping wheat that had in it the seeds of this trouble.

The defendants being domiciled in Australia, the plaintiffs applied to the District Registrar at Liverpool for leave to serve a writ out of the jurisdiction pursuant to Order xi., r. 1 (*e*), (iii.). The Registrar gave leave by an order of April 12, 1940. The solicitors for the defendants entered a conditional appearance "without prejudice to an application (I.) to set "aside the writ and (2.) to discharge the order authorizing "such service." That application was duly made to the District Registrar; and on September 23, 1940, he dismissed it. The defendants appealed from such dismissal to the judge in chambers. On October 24 Stable J. allowed the appeal, and set aside the order for service of the writ. The plaintiffs appeal to this Court and ask that the order of the Registrar may be restored.

Order XI., r. 1 (*e*), (iii.) provides as follows: "Service out "of the jurisdiction of a writ . . . . may be allowed by the "Court or a judge whenever . . . . the action is one brought ". . . . to recover damages . . . . in respect of the breach of "a contract . . . . by its terms . . . . to be governed by "English law."

The contract between the plaintiffs and the defendants is the bill of lading under which the defendants' wheat was shipped. That is an immensely long document printed in very small type. One of the most legible, because one of the shortest clauses in it is No. 16: "The contract evidenced by "this bill of lading shall be governed by the law of England."

Upon that it would appear plain that the plaintiffs can prima facie claim a right under Order XI. to ask for leave to serve a writ on the defendants out of the jurisdiction.

But the defendants rely on other parts of the bill of lading, and in particular on clause 1. The material part is the first paragraph: "All the terms, provisions and conditions of the "Australian Sea Carriage of Goods Act, 1924, and the "Schedule thereto are to apply to the contract contained in "this bill of lading; and the carrier is to be entitled to the "benefit of all privileges, rights and immunities, contained in "such Act and the Schedule thereto as if the same were herein "specifically set out. If anything herein contained be "inconsistent with the said Act and Schedule it shall, to the "extent of such inconsistency and no further, be null and void." The Australian Sea Carriage of Goods Act, 1924, is the equivalent of the British Sea Carriage of Goods Act, 1924. The object of both was to give statutory effect to what are known as The Hague Rules. Those rules are set out in the Schedule to each Act; and the two Schedules are in identical terms.

The effect of incorporating the provisions of the Australian Act into the contract is similar to the older practice of incorporating the terms of the American Harter Act. Of that Lord Esher M.R. in *Dobell* v. *Steamship Rossmore Co.* (1) said: "What we have to do is to construe the bill of lading, "reading into it as if they were written into it the words of "the Act of Congress." And a little further on he says (2): "They then introduce into their bill of lading the words of "the Harter Act, which I decline to construe as an Act, but "which we must construe simply as words occurring in this "bill of lading."

In the result, in effect, the contract in this bill of lading is this: "This contract is to be governed by English law. The "goods are shipped by the shippers and are to be carried by "the shipowners pursuant to the fifteen clauses in very small "print, supplemented by the terms of the Australian Act and "its Schedule which are to be read into this contract as "additional stipulations in it."

The object of this clause 1 was obviously to make the shipment subject to the Hague Rules, set out in the Schedule to the Act. That object would have been sufficiently assured if the clause had read: "All the terms, provisions and "conditions of the Schedule to the Australian Act of 1924 are "to apply to the contract in this bill of lading and the carrier "is to be entitled to the benefit of all privileges, rights and "immunities contained in such schedule as if the same were "herein specifically set out." If that were the wording there would be nothing to impair the full and effective validity of the later clause: "The contract evidenced by this bill of "lading shall be governed by the law of England."

But the clause as printed incorporates as part of the contract not only the Schedule to the Act, but "all the terms, conditions "and provisions" of the Act itself, as well as the Schedule. And the second sentence is: "If anything herein contained "be inconsistent with the said Act and Schedule it shall to

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(1) [1895] 2 Q. B. 408, 412.

(2) Ibid. 413.

"the extent of such inconsistency, and no further, be null "and void."

The defendants are anxious not to be sued in the English courts. The plaintiffs' right so to sue them can only arise if clause 16—" This contract is to be governed by English law " —is valid and effective. As the first clause incorporates all the provisions of the Australian Act, the defendants naturally rely upon part of s. 9 of the Act.

[His Lordship read sub-s. 1 of that section and proceeded]:

I am driven to the conclusion that the immensely complicated contract between the parties, in effect, becomes this: "(1.) This contract is to be governed by English law. "(2.) The goods are shipped and are to be carried on the terms "of the mass of small print hereon, supplemented by the "terms of the Australian Act and its Schedule, which are to "be read into this contract as additional stipulations. "(3.) By reason of one of those additional stipulations we are "to be deemed to contract according to the law in force in "Brisbane, and anything in our contract to the contrary is "to be null and void and of no effect."

I am, therefore, driven to the conclusion that clause 16: "This contract is to be governed by English law," is by another part of the contract to be null and void and of no effect. If so, the condition justifying leave to issue this writ was not fulfilled, and the decision of Stable J. was correct.

This result may be unfortunate for the plaintiffs. So far as one can ever impute a common intention to the parties to a verbose and illegible bill of lading, I should suspect that they did intend clause 16 to have its manifest and simple meaning, and that it was per incuriam that they added as a further part of the contract the nullifying stipulation in s. 9 of the Act, while all they were really concerned about was to add the provisions of the Schedule. But the contract is as the plaintiffs issued it and the defendants accepted it; and its terms must prevail, with this possibly fortunate result for the defendants. The appeal must be dismissed with costs.

It is unnecessary to express any opinion on the second question, as to which *Logan* v. *Bank of Scotland* (*No.* 2) (1) and other cases were cited to us. It is apparant that if the case were tried in England evidence from Australia would be needed. And if it be tried in Australia much evidence from England will be necessary. In either case there must be inconvenience to one side or the other.

LUXMOORE L.J. I agree that this appeal fails and should be dismissed.

[His Lordship stated the facts leading up to the appeal, and proceeded]: There is no note of the judgment of Stable J., but I understand that he directed that the order for service out of the jurisdiction should be set aside because in his opinion the contracts in question were not governed by English law, but by Australian law. I understand that the plaintiffs, both before the Registrar and Stable J., relied on two points. First, they claimed that the contract was by its express terms governed by English law; and, second, if it was so governed, then they claimed that the Court, in the exercise of the discretion conferred by Order XI., ought to allow the action to be decided in the English courts as the "forum conveniens". I understand that the District Registrar decided both points in favour of the plaintiffs. As already stated, the learned judge over-ruled the decision of the District Registrar on the first point and expressed the opinion that, if he had taken a different view with regard to it he would not have thought it right to interfere with the manner in which the District Registrar had purported to exercise his discretion.

The main point to be determined is whether the learned judge was correct in holding that there was no jurisdiction to make the order because the contract was not by its terms or by implication to be governed by English law. As Lord Atkin said in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (2), "The legal principles "which are to guide an English Court on the question of the "proper law of a contract are now well settled. It is the law

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(1) [1906] 1 K. B. 141.

(2) [1937] A. C. 500, 529.

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"which the parties intended to apply. Their intention will be "ascertained by the intention expressed in the contract if "any, which will be conclusive. If no intention be expressed "the intention will be presumed by the Court from the terms "of the contract and the relevant surrounding circumstances. "In coming to its conclusion the Court will be guided by rules "which indicate that particular facts or conditions lead to a "prima facie inference, in some cases an almost conclusive "inference, as to the intention of the parties to apply a "particular law: e.g., the country where the contract is made, "the country where the contract is to be performed, if the "contract relates to immovables the country where they are "situate, the country under whose flag the ship sails in which "goods are contracted to be carried. But all these rules but "serve to give prima facie indications of intention: they "are all capable of being overcome by counter indications, "however difficult it may be in some cases to find such. "The principle of law so stated applies equally to con-"tracts to which a sovereign State is a party as to other "contracts."

Accordingly, it is necessary in the present case to consider the terms of the bills of lading. The last term in the bills of lading, namely, that contained in clause 16 thereof, is: "The "contract evidenced by this bill of lading shall be governed by "the law of England." Plainly, if this clause stood alone and there was no provision in the contract to contradict it, it would be decisive of the matter; but this is not the fact, for clause 1 of each of the bills of lading provides, so far as is material: "All the terms, provisions and conditions of the "Australian Sea Carriage of Goods Act, 1924, and the Schedule "thereto, are to apply to the contract contained in this bill "of lading, and the carrier is to be entitled to the benefit of "all privileges, rights and immunities contained in such Act "and the Schedule thereto as if the same were herein specific-"ally set out. If anything herein contained be inconsistent "with the said Act and Schedule it shall, to the extent of such "inconsistency and no further, be null and void."

To give effect to this provision it is necessary to read into the contract the whole of the Australian Sea Carriage of Goods Act, 1924, including the Schedule to it, not as an Act of the Australian Legislature, but as if all the words of that Act and the Schedule to it were written out at length in the bill of lading as constituting part of the contract therein contained: see *Dobell & Co.* v. *Steamship Rossmore Co.* (1), per Lord Esher M.R. If this be done the bill of lading must be read as containing these words, which are, so far as this case is concerned, the material words of the clause, namely: "All parties . . . . shall be deemed to have intended to "contract according to the laws in force at the place of ship-"ment and any stipulation or agreement to the contrary ". . . . shall be illegal, null and void, and of no effect."

The place of shipment under the bills of lading in the present case was Brisbane. To my mind the only meaning which the words "All parties shall be deemed to have intended to "contract according to the laws in force at the place of "shipment" are on the facts of this case capable of bearing is that the contract is to be governed by the laws in force at Brisbane, that is to say, Australian law. No doubt had s. 9 of the Act stopped here, it would have been difficult to determine the precise meaning and intention of the parties; but they do not. The words "any stipulation or agreement "to the contrary shall be null and void and of no effect," are part of the section. The words of clause 16 of each of the bills of lading cannot fairly be said not to be a stipulation or agreement to the contrary of that contained in the first part of s. 9; and, consequently, clause 16 must, on the express words contained in the latter part of the section, be treated as "null and void and of no effect," and must, therefore, as a matter of construction of the contracts, be ignored, with the result that the contracts are to be governed, according to the true meaning of the parties as expressed in the contracts, in accordance with Australian law.

It follows, therefore, that the contracts cannot be brought within the material words of Order XI., r. 1 (*e*), sub-para. (iii.); and there is no jurisdiction in the Court or a judge to consider

(1) [1895] 2 Q. B. 408, 412.

whether the discretion conferred by the order should be exercised or not.

Speaking for myself, I do not consider it necessary to consider whether, assuming, contrary to the opinion I have already expressed, that the jurisdiction existed, the Court ought to exercise it in favour of the plaintiffs, because no useful purpose would be served by such consideration.

I agree that the appeal ought to be dismissed, with the usual consequences.

DU PARCQ L.J. I agree that this appeal should be dismissed. As I understood the argument on behalf of the appellants, it conceded that full effect must be given to clause 1 of the bill of lading. In order to reconcile the apparent conflict between clause 1 and clause 16, counsel for the appellants had recourse to the elementary principle of English law, that in construing a contract effect must be given to the intention of the parties, so that if the parties have agreed that the law of another country shall be the law of the contract, English law will as a general rule give effect to that agreement. He asks us to read clause 16 as merely importing this principle into the contract. This may be a possible construction, and is perhaps the only possible construction which comes near to making sense of the contract contained in the bill of lading. My difficulty has been to see why it is suggested that this construction leads to the desired conclusion. It is to my mind impossible to say that English law "governs" the contract in any practical or real sense when the only function of the English law is to direct that the relevant Australian law must prevail. Moreover, I have always supposed that the justification of r. 1 (*e*) (iii.) of Order XI. is to be found in the fact that, where parties have agreed that their contract shall be governed by English law, it is convenient that courts familiar with that law should interpret and enforce the contract. It clearly cannot be said that English courts are more familiar with the Australian Sea Carriage of Goods Act, or better able to interpret it, than are the courts in Australia.

In truth, the appellants' argument seems to me to be an example of curiously, I would almost say fantastically, inverted reasoning. If the geographical situation of the parties were reversed, and if an application had been made in Australia for leave to serve the writ on a defendant in England, then (assuming that Order XI. has its counterpart in Australia) the Courts of the Dominion might well have said that the contract was "by its terms to be governed by Australian law," and perhaps might have been justified in disregarding clause 16 as hardly affecting the question. Or, to put the same point in another way, if the parties before us were the same as they are now, but the contract different, so that clause 1 of the bill of lading incorporated the provisions of our own Carriage of Goods by Sea Act, 1924, and clause 16 said that the contract was to be governed by the law of Australia, the plaintiffs, though I do not say that they would certainly succeed, would at any rate have much stronger ground for their contention that the contract was in truth governed by English law.

I wish to add that if I had thought it possible to say that the appellants had succeeded in bringing themselves technically within the words of the rule, I should have been little disposed to regard this as a case in which the Court should exercise its discretion in their favour or, in the words of Order XI., r. 4, as a proper case for service out of the jurisdiction. It should never be forgotten that the jurisdiction which the Legislature has permitted our courts to assume over persons who are physically outside their jurisdiction and are often the subjects of foreign states must always be exercised with discrimination and with scrupulous fairness to the defendant. We were properly referred to the judgment of Farwell L.J. in *The Hagen* (1), from which it appears that the view expressed by Pearson J. in *Société Générale de Paris* v. *Dreyfus Bros.* (2), was approved by this Court. It is, indeed, as Pearson J. said, always a very serious question whether "a foreigner who "owes no allegiance here" should be put to "the inconvenience "and annoyance of being brought to contest his rights in this "country."

Counsel for the appellants at one time seemed to suggest that a subject of the Crown domiciled in one of the Dominions was not to be regarded with the same consideration as a foreigner; but this suggestion I think cannot be seriously entertained. The comity which prevails between friendly nations is not excluded by the fact that they each form part of the British Commonwealth. Comity is not incompatible with kinship.

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(1) [1908] P. 189, 201.

(2) (1885) 29 Ch. D. 239, 242.

It may be observed that if the parties had wished to confer jurisdiction on the courts of this country or to agree that service of a writ issued in England might be effected in Australia, there would have been nothing, in English law at any rate, to prevent them from inserting a term in this contract to that effect. Indeed, Order XI., r. 2A, expressly provides for such agreements. No term of the kind is to be found in the contract; and, even if clause 16 stood alone, it could not, in my opinion, be read as impliedly conferring jurisdiction: it would merely have had the effect of making it possible, though not certain, that the English courts would assume jurisdiction. It is unnecessary to consider in the present case whether the English courts would give effect to the provisions of s. 9 of the Australian Sea Carriage of Goods Act, 1924, if they were not incorporated in the contract between the parties.

In my judgment, Stable J. came to the right decision; and the appeal fails.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for appellants: *Bentleys, Stokes & Lowless, for Alsop, Stevens & Collins Robinson, Liverpool.*

Solicitors for respondents: *Gregory, Rowcliffe & Co., for Laces & Co., Liverpool.*

R. F. S.

SMALLMAN *v.* EMBASSY CINEMA (TOTTENHAM COURT ROAD), LIMITED.

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[1940. S. 3634.]

Courts emergency powers—Building agreement—Lease granted to nominees of parties to the building agreement—Lease granted after the commencement of the war—Rent in arrears—Order for possession and for payment of arrears—Whether leave to proceed to levy execution required—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 ; *s.* 7.

After the outbreak of war a company accepted a lease of premises as nominees of the persons who were parties to a building agreement entered into before the war and were entitled as soon as they had erected a cinema on the land in question, to have a lease of the premises granted to them or their nominees. The company fell into arrear in the payment of the rent and the landlord obtained an order for possession and for payment of the arrears of rent :—

Held, that, having regard to the proviso to s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1939, the company was not entitled to the protection conferred by s. 1, sub-s. 2, seeing that the debt in respect of the arrears of rent arose entirely under the lease which was entered into after the commencement of the Act.

Appeal from Stable J.

By a building agreement, dated February 28, 1939, between the plaintiff and Montague Cohen and Arnold Michaels (called "the tenants"), it was agreed that upon the tenants obtaining the consent of the appropriate authorities, the tenants should be allowed to enter on certain land and premises in Tottenham Court Road and erect thereon a cinema with all proper offices and outbuildings. By clause 17 it was provided that as soon as the buildings were completed to the satisfaction of the plaintiff's surveyor the plaintiff was to grant and the tenants were to accept and execute a counterpart of a lease of the said land and premises with the new buildings erected thereon for a term expiring fourteen days before December 25, 2019, at the yearly rent of 1750*l.* By clause 18 the tenants might by notice in writing require the plaintiff to grant the lease to a nominee or nominees. The form of lease was set out in a schedule to the agreement.

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Shortly before the outbreak of the present war the tenants gave notice in writing to the plaintiff, requiring him to grant the lease to the defendants, a limited company that it was then proposed to form and which was incorporated on September 22, 1939; and on September 27, 1939, a lease was granted to the defendants pursuant to the terms of the building agreement. The cinema was opened on September 25, 1939, but owing to the black-out conditions, lack of transport and falling off of the public attendance at West End cinemas, the box office receipts fell below anticipation, and finally, on September 16, 1940, the cinema was closed. The cinema had since been damaged by enemy action. In these circumstances the quarter's rent which became due on September 29, 1940, was not paid, and on November 12, 1940, the plaintiff commenced proceedings, claiming possession of the cinema premises and 437*l.* 10*s.* in respect of the quarter's rent. The plaintiff also applied for leave to levy execution under the judgment, and on December 19, 1940, judgment was given by Master Burnand for possession and for the arrears of rent, and the plaintiff was given liberty to levy execution on the judgment, subject to a stay pending an appeal until January 3, 1941.

Stable J., sitting as judge in Chambers, allowed the appeal and set aside the order for possession of the premises and suspended the order giving leave to issue execution in respect of the arrears of rent under the Courts (Emergency Powers) Act, 1939.

The plaintiff appealed. The appeal was heard on January 27, 1941.

Gerald Gardiner for the appellant. The Master held that as the lease was granted after the commencement of the present war, the Courts (Emergency Powers) Act, 1939, did not apply, and he therefore gave leave to levy execution and not leave to proceed. The respondents' appeal related only to the question under the Courts (Emergency Powers) Act, 1939, and the order made by Stable J. was wrongly drawn in so far as it purported to set aside the order for possession. Further, having regard to the fact that the lease was granted after the commencement of the war, when the Act came into force, Stable J. was in error in treating the Act as applying: see the proviso to s. 1, sub-s. 2, of the Act and s. 7, and an order made thereunder, which made the Act come into force on September 2, 1939.

[SIR WILFRID GREENE M.R. Does not the liability here arise by virtue of the building agreement?]

That might be so if the respondents had been parties to the building agreement, but their obligation arises entirely under the lease as they are nominees of the tenants. The respondents need not have taken the lease but they chose to do so after the war had started.

[He was stopped.]

H. Lester for the respondents. The source of the rights and obligations under which this debt arose and under which possession was claimed is the building agreement. The lease itself created no rights but merely put the position on a more formal footing.

[SIR WILFRID GREENE M.R. The liabilities did not exist as against the respondents till the lease was executed.]

Under the building agreement the lease was to be granted to the persons therein called the tenants or their nominees. The nomination of the respondents merely filled in a blank, but the obligation was the same. There must be more than one document taken into account in deciding the source of the obligation. They are the building agreement, the nomination in writing. and the lease. It is not right to have regard only to the lease. All the terms of the contract are set out in the building agreement. *Page* v. *Skelt* (1) assists the respondent's contention.

[No reply was called for.]

SIR WILFRID GREENE M.R. The only point which arises in this appeal is as to the application of the Courts (Emergency Powers) Act to the facts of the present case. Shortly stated they are as follows.

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(1) [1940] 2 All E. R. 419.

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[His Lordship briefly summarized the provisions of the building agreement set out above and proceeded:] On September 22, 1939, the present defendants, the respondents to this appeal, were incorporated under the Companies Acts, and on September 27, 1939, the lease contemplated by the building agreement was granted to the defendants. That was in pursuance of a nomination under clause 18 of the building agreement, which, of course, was necessary, and the acceptance by the defendants of the lease was the acceptance of that nomination. It is perfectly clear that the defendants came under no contractual obligation whatsoever until that lease was executed. Unless and until the contemplated lease was taken by a nominee of the two gentlemen who were parties to the agreement, those two gentlemen, and they alone, were under liability to the plaintiff. In order that the defendants might become liable three elements were necessary, first of all the original building agreement, which was a pre-war agreement; secondly, the nomination under clause 18. That nomination, we were told, in fact was made before the company was actually incorporated, that is to say, before September 22, 1939. It was in fact made before the war, but it could only become effective when the defendants were incorporated and accepted the lease. That nomination was the second element. The third element was the taking of the lease by the defendants. Of those three elements the last also took place after the outbreak of the war. In these circumstances the question is whether or nor the defendants are entitled to claim relief under the Courts (Emergency Powers) Act, 1939. The relevant words are to be found in the proviso to sub-s. 2 of s. 1 of the Act, the material part of which is in the following terms: "Provided that this subsection shall not apply to any "remedy or proceedings available in consequence of any "default in the payment of a debt or the performance of an "obligation, being a debt or obligation arising by virtue of a "contract made after the commencement of this Act." The debt or obligation of this company arose by virtue of the lease and nothing else, because before they executed that lease they were under no obligation to anybody. The fact that the lease historically, so far as they are concerned, originated in the building agreement to which they were not parties is, in my judgment, quite irrelevant. Historically that is true, but the question which we have to consider in interpreting this proviso and applying it to the facts, is whether the debt or obligation which it is sought to enforce arose qua the person against whom it is sought to enforce it by virtue of a contract made after the commencement of the Act. In the present case it seems to me that there is only one answer to that question. These defendants being under no pre-war obligation, nor, indeed, under any obligation to do so, chose after the outbreak of war to assume the obligations contained in the lease. They were not in any way bound to do it, it was a matter of free choice on their part. Had the lease been granted to the original parties to the agreement that argument would not have applied and very different considerations might have had to be taken into account, because they were under a contractual obligation to take the lease and unless a nominee were provided would have been compelled to accept the lease themselves. But there is all the difference in the world between that case and this, because here the obligation which it is now sought to enforce on these defendants came into existence for the first time when the lease was granted. In the result this appeal upon that point succeeds. As to the other point, the judgment as drawn up contains an admitted error, and the appeal must be allowed on that point also.

MACKINNON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal allowed.

Solicitors: *Wilkinson, Bowen, Haslip & Jackson ; Syrett & Sons.*

H. C. G.

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Jan. 28, 29.

STOCKHOLMS ENSKILDA BANK AKTIEBOLAG *v.* SCHERING, LIMITED.

[1939. S. 3354.]

Trading with the enemy—Debt of German company to Swedish bank—Agreement by English company to pay debt in instalments on receiving assignments of corresponding parts of German debt—Instalment becoming due since the outbreak of war—Swedish company's claim for payment—Financial dealing for benefit of enemy—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 1, *sub-s.* 2 (*a*) (*ii.*) *and* (*iii.*).

By an agreement made in February, 1936, a Swedish bank placed at the disposal of a German company a sum of reichsmarks and the German company agreed to repay it in sterling subject to a discount eight years later. By an agreement dated April 16, 1936, an English and an Indian company became sureties for the payment of the debt by the German company and also jointly and severally agreed as principals and not as guarantors to pay the amount of the debt by instalments on having a proportionate part of the German company's debt assigned to them against payment of each instalment. In an action by the Swedish bank against the English company to recover an instalment becoming due after the outbreak of war with Germany :—

Held (affirming the decision of Hawke J.) that the payment of the instalment was made an offence under the Trading with the Enemy Act, 1939, as it would result in the English company (i.) having financial dealings for the benefit of an enemy, within s. 1, sub-s. 2 (*a*) of the Act ; (ii.) making a " payment for the " benefit of an enemy " within sub-s. 2 (*a*) (ii.) ; and (iii.) discharging an obligation of an enemy within sub-s. 2 (*a*) (iii.) ; and therefore that the action failed. The words " for the benefit of an enemy " were words of the widest possible character and could not be given a limited construction.

APPEAL from Hawke J.

By an agreement dated February 24 and 28, 1936, and made in the German language between the plaintiffs, Stockholms Enskilda Bank Aktiebolag, a Swedish banking company (called in the agreement "the Enskilda"), of the first part, Schering-Kahlbaum Aktiengesellschaft, a German company (called in the agreement "Schering"), of the second part, and Schering, Ld. and Schering Kahlbaum Indie, Ld. (an English and an Indian company respectively and together referred to in the agreement as "the sureties") of the third part, the following contract of debt was concluded. Clause 1 provided: " The Enskilda will, "at latest one month after coming into operation of the "contract, place at the disposal of Schering an amount in "reichsmarks to the amount of the equivalent of 84,000*l*. "sterling . . . . For the conversion of the reichsmarks the "official Berlin medium rate of exchange for payment in "London on the working day preceding the paying out shall "apply . . . ." Clause 2 provided: "In respect of the placing "at disposal of the amount specified in clause 1 Schering "shall be indebted to the Enskilda in a sum amounting to "50,400*l*. free of interest. The debt shall fall due on the expiry "of eight years reckoned from the day of paying out, and "it is to be repaid by Schering . . . . on the due date in "effective pounds sterling, unless the foreign exchange enact- "ments then in force constitute a hindrance to this. . . ." Clause 3 provided: "For the debt the sureties constitute "themselves surety jointly and severally as principals to the "amount of 50,400*l*. with the proviso that, against the liability "as sureties all payments must be set off which the Enskilda "have received from the sureties or one of the sureties or from "the principal debtor . . . . in respect of the loan." Clause 4 provided: "The sureties will acquire from the Enskilda "its claims against Schering by instalments . . . ." Then followed a proviso that they should pay to the Enskilda at intervals of six months sums from one and a half years after the day of paying over till eight years after that date making together the sum of 50,400*l*. Of these payments the first four were to amount to 6300*l*. each, the next two to 3360*l*. with subsequent payments of decreasing amounts. The clause continued: "If, and to the "extent that the sureties do not acquire the claim at the "dates specified the remission, resulting from clause 2 in "conjunction with clause 1 shall, without prejudice to the "provision of clause 3, lapse rateably in respect to that "amount of debt which remains in relation to Enskilda after "setting off any payments which may have been made. "(Example: Enskilda has received 6300*l*. and no further "payments have been made, there remains a debt of Schering to Enskilda to the amount of 73,500*l*.) . . . ."

Clause 7 provided: "Enskilda can call in the debt with "immediate effect by registered letter to Schering, if Schering, "the sureties or one of the sureties, becomes bankrupt or "applies for opening of proceedings for an arrangement with "creditors." Clause 8 provided that the contract of debt was subject to German law but that for the legal relationship "between the sureties and the Enskilda under the contract "English law . . . . applies in every respect."

By an agreement dated April 16, 1936, contained in a letter addressed by the sureties to Enskilda, the sureties guaranteed the payment in sterling of a sum in no case to exceed 50,400*l.* sterling "with the proviso that all payments which you have "received from us or one of us or on account of the said "advance from the German company . . . . are to be "taken in reduction of our liability hereunder." The letter continued: "Further we hereby jointly and severally "undertake as principals and not as guarantors to make "the following payments to you in consideration of "the assignment by you to us on the occasion of each "such payment of a like sterling amount of your claim "against the German company." Then followed a provision as to payments half yearly from one and a half years after the date of making the advance to the German company to eight years from that date of the varying amounts mentioned in clause 4 of the agreement of February 28, 1936.

Each such payment was to be in satisfaction pro tanto of the sureties' liability under the guarantee and they were not to be liable to make such payments in so far as they had been satisfied by the Germany company. Default in payment of any one instalment was not to accelerate the date for payment of any other instalment. The guarantee and agreement was made in accordance with the law of England.

There was also a letter of pledge dated April 16, 1936, by which the defendants, Schering, Ld., pledged certain goods as security for their liability whether as guarantors or principals under the document of guarantee of the same date given by them and the Indian company.

The sureties having failed to pay the instalment of 3360*l.*

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which became due on October 28, 1939, the plaintiffs commenced these proceedings against the defendants by a writ dated October 30, 1939, claiming payment of the sum of 3360*l.* due to them under the agreement of April 16, 1936, in consideration of their assigning to the defendants a like sterling amount of the plaintiffs' claim against the German company.

The defendants set up the defence that the German company was an enemy under the Trading with the Enemy Act, 1939, and contended that if they made the payment claimed they would be guilty of an offence of trading with the enemy within the meaning of s. 1 of the Act on the ground either that such payment would be for the benefit of the German company or that it would operate to discharge pro tanto the obligation of the German company as principal debtor to the plaintiffs.

Hawke J. said he did not think this was an ordinary contract of guarantee. It was an arrangement by which an English company said to a Swedish company: "if you will advance a "certain sum of money to a German company, we will pay you "certain instalments on certain terms." Although the expression "surety" was used in the agreement, the agreement expressly said it was not to be a question of guarantee. They had to pay the instalments in default of the German company paying them, but the German company had not got to pay them at all, but to pay at some lengthily deferred date a large sum of money unless before that time the English Company and the Indian company had paid a less sum of money. There was no implied obligation on the German company to indemnify the English company as and when each instalment was paid. The effect then of each payment was to discharge an obligation of the Germany company. He thought that the payment came within the terms of the Trading with the Enemy Act, 1939 (1), because

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(1) Trading with the Enemy Act, 1939, s. 1, provides:

"(1.) Any person who trades "with the enemy within the "meaning of this Act shall be "guilty of an offence of trading "with the enemy and shall be "liable" for the penalties there stated. . .

"(2.) For the purposes of this "Act a person shall be deemed to "have traded with the enemy— "(*a*) if he has had any com-"mercial, financial or other inter-"course or dealings with, or for "the benefit of an enemy and, in "particular, but without pre-"judice to the generality of the

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it would be a financial dealing for the benefit of the enemy within s. 1, sub-s. 2 (*a*), and that it also came within s. 1, sub-s. 2 (*a*) (ii.), as being a payment of money to the benefit of the German company. He thought also it came within s. 1, sub-s. 2 (*a*). (iii.). Judgment was therefore given for the defendants.

The plaintiffs appealed. The appeal was heard on January 28, 29, 1941.

C. R. Havers K.C. and *Valentine Holmes* for the appellants. The effect of payment by the respondents is not to discharge any obligation of the enemy company. The obligation merely becomes an obligation to the English company instead of to the appellants. Therefore, the respondents will not by payment have "performed any obligation to, or discharged "any obligation of, an enemy" within s. 1, sub-s. 2 (*a*) (iii.), of the Trading with the Enemy Act, 1939. The Act does not prohibit benefits which will come into operation after the termination of the war. The prohibition was never intended to extend to the case of a person discharging a genuine obligation which may indirectly benefit the enemy.

[They referred to *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1); *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Carton-nagen-Industrie* (2).]

There was here a pre-war contract imposing on the respondents an obligation to pay a Swedish debt and it cannot be said that the Trading with the Enemy Act, 1939, applies: see *Rex* v. *Kupfer* (3) a case decided under corresponding provisions of the Act in force during the last war. The Act is not intended to prevent payment under a legal obligation to a neutral incurred before the outbreak of war when the result is only an incidental benefit to an enemy. The true

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" foregoing provisions, if he has
" . . . .
" (ii.) paid or transmitted any " money . . . . to or for the " benefit of an enemy . . . . ; " or
" (iii.) performed any obligation to, or discharged any " obligation of, an enemy, " whether the obligation was " undertaken before or after the " commencement of this Act."

(1) [1916] 2 A. C. 307.

(2) [1918] A. C. 239, 258.

(3) [1915] 2 K. B. 321.

position, indeed, is that payment does not benefit the enemy company, in view of the assignment of part of the debt, but that non-payment would injure the company by increasing their liability to 84,000*l*. No doubt the contract here is unusual but it is very difficult to draw a line between this and the ordinary case of a surety. If a surety discharges a debt, he is not discharging the debt of the principal debtor but his own obligation. The judgment of Hawke J. in this case goes further than any previous case.

But if the Court holds that the Act applies, this is no ground for dismissing the action. The plaintiffs are under no incapacity and it is payment only that constitutes an offence. Judgment should therefore be given to the plaintiffs subject to a stay preventing a breach of the Act : *Schmitz* v. *Van der Veen & Co.* (1). Further the Court should order payment of the sum into Court.

[SIR WILFRID GREENE M.R. The plaintiffs are not entitled to a simple order for payment but to an order for payment against an assignment of a share of the German company's debt. Each of these transactions would in our view of the case be a breach of the Act.]

If no order for payment can be made, the plaintiffs ask for a declaration of their rights.

A. T. Miller K.C. and *J. A. Wolfe* (for *Maurice Berkeley*, on war service) for the respondents. There are three documents showing together the contracts between the various parties. Of these only two are of importance here : the contract of loan dated February 28, 1936, and the contract of guarantee of April 16, 1936. When these are read together it becomes clear that the present action does not lie in view of the Trading with the Enemy Act, 1939. The claim has been made for a payment of a debt instead of, as it should have been, a claim for specific performance, seeing that the payment of an instalment is made conditional on an assignment of part of the German company's debt. But there is on either view a supervening illegality which makes it impossible to perform the obligation. That illegality arises from the Act and it affords a complete

(1) (1915) 112 L. T. 991 ; 84 L. J. (K. B.) 861.

defence to this action which, therefore, was rightly dismissed. The defendants' answer to the claim is that they are not liable. There is no reason for not dismissing the action for it could not justify the plea of res judicata when the circumstances had changed. It must be remembered too that this might well be a case where time was of the essence of the contract so that, if it could not be satisfied at the due date, it would lapse altogether. This case closely resembles cases of frustration. Therefore unless the appellants can satisfy the Court that the Act does not apply, the judgment of Hawke J. should stand.

On the main point it is necessary to distinguish between acts and payments under contract which would benefit the enemy and cases relating to enemy property, its forfeiture and seizure. Thus the case relating to a bill of exchange referred to in argument is different, for a bill of exchange is more than an obligation and is in itself of value. The Trading with the Enemy Act constitutes an addition to the Common Law and it must not be cut down or limited in scope but be given a wide and all embracing character. It is a wide net intended to stop during war time dealings that would otherwise be unobjectionable. There is nothing in the words of s. 1, sub-s. 2 (*a*), making it an offence to have any financial dealings for the benefit of an enemy, to enable the Court to say that, if payment is primarily in discharge of an obligation to a neutral, it is not an offence although it enures for the benefit of an enemy. Further, there is a liability on the German company to pay a debt which may be increased to 84,000*l*. and a contingent liability to pay it on demand if the German, English or Indian company became bankrupt. Therefore there is no doubt about the relief from its obligation given to the German company by any payment of the English company. The second ground on which the claim is covered by the Act is that payment would be for the benefit of the German company within s. 1, sub-s. 2 (*a*) (ii.). The appellants relied on *R. & A. Kohnstamm, Ld.* v. *Ludwig Krumm* (*London*), *Ld.* (1). But that case is so different that the Court need not deal with it, though, if necessary, the respondents would contend that that decision ought not to stand.

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(1) [1940] 2 K. B. 359.

The third ground on which the Act applies is that the respondents by making this payment would be discharging an obligation of the German company within s. 1, sub-s. 2 (*a*) (iii.). The contention that payment would be made against a transfer pro tanto of the German company's obligation and therefore that the German obligation would not be in any degree discharged, loses sight of the fact that the debt would in certain circumstances be immediately recoverable by the Swedish company and that during the war the English company would not have this advantage. Further the German company would be benefited by having his debt reduced pro rata. Hawke J. was therefore right on all three grounds and the appeal should be dismissed.

Havers K.C. replied.

SIR WILFRID GREENE M.R. The transactions out of which this litigation arose are somewhat unusual, but from the commercial point of view they are intelligible having regard to the relationship of the parties and the exchange difficulties which were prevalent at the time.

The present appellants, who are a Swedish banking company, were the owners of a sum of German reichsmarks, which at the current official rate of exchange were worth 84,000*l*. sterling. These reichsmarks a German company called Schering-Kahlbaum Aktiengesellschaft of Berlin was minded to acquire. The appellants were willing to place these reichsmarks at the disposal of the German company on the terms that they should receive repayment, on certain agreed terms, in sterling. The sum of sterling which they were to receive was 50,400*l*.; that is to say, they were placing at the disposal of the German company reichsmarks, the official value of which was 84,000*l*., in consideration of a promise to pay a reduced sum of 50,400*l*. Putting it shortly, they were selling those reichsmarks at a substantial discount—we were told that the discount works out at 8*s*. in the £. The existence of exchange difficulties which might have made it difficult, if not impossible, for the German company to discharge that sterling obligation, apparently led to the introduction into the transaction of

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two companies, one of them the present respondents, a company incorporated in the United Kingdom, the other a company incorporated in India. I will call those two the English and the Indian company respectively. Those two companies were subsidiaries of the German company, and it seems that the payment of a sterling sum to the appellants could be conveniently arranged through the medium of those two companies who were, of course, not subject to any restrictions in force in Germany in relation to foreign exchange.

With those prefatory observations, which I think assist in understanding the nature of the transactions, I come to look at the documents by which they were to be carried out. The actual contract upon which the appellants are suing was a contract dated April 16, 1936, and made between the appellants, the English company (that is to say, the respondents), and the Indian company; but in order to understand the results that would flow from the performance of the obligations undertaken by the English company under that agreement, it is necessary to look at an earlier document, which is dated February 24 and 28, 1936. It is made between the appellants of the one part, the German company of the other part, and also the English and Indian companies as sureties. It is in the German language and, from the translation which we have, its terms were to the following effect so far as it is necessary to refer to them. The contract is described as a contract of debt. By clause 1, the appellants agree to place at the disposal of the German company the reichsmarks to which I have referred, valued, at the official rate, at 84,000*l.* sterling. Clause 2 makes the German company a debtor to the appellants in the sum of 50,400*l.* sterling, free of interest. That debt was to fall due at the end of eight years, and was to be repaid in sterling unless the foreign exchange enactments then in force in Germany should prevent it. In that event, if the enactment required that the amount of the debt should be paid into a blocked account, payment was to be in reichsmarks at the official Berlin rate of exchange. Then comes clause 3 under which the English and Indian companies, described as the sureties, constituted themselves "surety jointly and severally as "principals to the amount of 50,400*l*." Then clause 4 contains an ancillary provision, which is not a provision which flows from the relationship of principal and surety, but was obviously inserted to give effect to the arrangement under which the sterling necessary for repayment of the loan should be provided by the English company and the Indian company or one of them. That clause provides that the sureties are to acquire from the appellants their claim against the German company by instalments, and then a table is set out giving the dates on which, and the amounts of sterling in which, those instalments are to be paid. The clause, therefore, is a clause under which the two companies are agreeing to purchase by instalments the sterling debt incurred by the German company to the appellants. There then follows a curious but intelligible provision. I will paraphrase the language used, which, in the translation, is somewhat obscure, but the meaning of which, it is agreed, is of this nature: if the two companies made default in acquiring an instalment of the debt on the due date, that being a sterling payment, the result was to be that the German company would lose the benefit of a proportionate part of the discount which they enjoyed in purchasing the reichsmarks—I have pointed out that this discount was 8*s*. in the £—and if the companies made default in buying the debt by instalments, the result would be that the debt of the German company would be raised to the nominal figure of 84,000*l*. less the payments already made, if any, by the two companies; those payments being treated as payments of 20s. for every 12s. in fact paid. In other words, the primary debt of the German company is the debt of 50,400*l*., which is 12*s*. in the £ on 84,000*l*. If that debt was duly taken over by instalments in accordance with the contract, the only sum which the appellants would receive would be 50,400*l*. If, on the other hand, a default was made in the payment of an instalment, the German company came under a liability to pay the full 84,000*l*, taking credit as against that of all payments previously made by the two companies, treating every 12*s*. which they had paid as in effect a payment of 1*l*. It leaps to the eye that it is to the advantage of the German company that those obligations of the English and Indian companies should be carried out punctually and in accordance with those terms, because the result of their not doing so, would be to impose upon the German company a greater obligation, in that their debt would fall to be scaled up by the disappearance or diminution of the discount. The next clause that I must refer to is clause 7, which empowers the appellants to call in the debt immediately, by registered letter to the German company, if the German company, or one of the sureties, became bankrupt or applied for an arrangement with its creditors. Clause 8 provides that the contract of debt is to be subject to German law, but that English law is to apply to the legal relationship between the English and Indian companies on the one hand, and the appellants on the other. That is all that I need refer to with regard to that document.

It appears that so far as the obligations of the English and Indian companies are concerned, they are, in the first place, constituted sureties for the debt, and in the second place they assume the obligation as principals of purchasing that debt by instalments; the result of the purchase being that the obligation of the principal debtor (the German company) to the appellants is, step by step, reduced as the instalments are paid.

The other document, which is the one which is sued upon, is dated April 16, 1936, and as I have said, is between the appellants and the English and Indian companies. It provides that in consideration of the appellants making, on the joint and several request of the two companies, an advance of 84,000*l.* sterling, to be made available in sperrmarks to the German company, the two companies, English and Indian, jointly and severally guarantee the payment in sterling of the amount thereinafter mentioned by the German company. I may say in parenthesis that sperrmarks are, or were, as we are informed, a type of reichsmark which was more effectively blocked than any other mark under the German currency laws. There is no question that the sperrmarks there referred to are the marks which, under the previous contract, were to be placed at the disposal of the German company. There are certain formal clauses in this document which I need not read. Then comes a provision that the amount recoverable under it should in no case exceed the sum of 50,400*l.* That, of course, is in accordance with the terms of the other contract. Then comes another clause (again inserted in order to carry out the arrangement contemplated by the earlier contract) under which the two companies jointly and severally undertake, as principals, and not as guarantors, to make the following payments to the appellants in consideration of the assignment by the appellants to the two companies on the occasion of each such payment of a like sterling amount of the appellants' claim against the German company. Then are set out the dates on which, and the instalments by which, those payments are to be made, one of them being as follows: "On or before the expiration of three years and six calendar "months from the aforesaid date the further sum of 3360*l.*" It is in respect of that sum that the present action is brought. Accordingly, by this document the two companies, as I have pointed out was the intention, are, as principals, agreeing to purchase the sterling debt owing by the German company to the appellants, and to pay for it in sterling. Then comes a provision that each of the payments should be a satisfaction pro tanto of the two companies' liability in respect of their guarantee; and the document ends by providing that it was made in accordance with the laws of England.

The instalment to which I have referred was not paid, and on October 30, 1939, the appellants issued their writ against the respondents, claiming payment of that instalment. It was pointed out in the course of the argument that that claim is technically incorrect. Quite apart from considerations of the war and war legislation, the appellants are only entitled to claim payment against an assignment by them of the proper part of the German company's debt. That is the only obligation which the respondents undertook. They were buying the debt by instalments and they were only liable to pay against the handing over of the necessary document of assignment. In truth the proper form of the action of the plaintiffs would have been an action for specific performance, in which they

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would have claimed specific performance of that agreement, and would have obtained an order (assuming they were entitled to it in other respects) that against payment of the money they should execute an assignment, or, putting it the other way round, that on delivery of a proper assignment by them the defendants should pay. That aspect of the matter has a bearing when I come to consider one of the arguments put forward on behalf of the appellants. I do not refer to it on any technical pleading ground, but it does relate to a point of substance which Mr. Havers raised in his argument.

The defence consisted of an allegation that the German company was an enemy within the meaning of the Trading with the Enemy Act, 1939, and a contention that the defendants, if they made the payment claimed in the statement of claim, would be guilty of the offence of trading with the enemy within the meaning of s. 1 of the said Act, on the grounds set out in the defence.

The only question which arises in the action and arises now, is as to the application of the relevant provisions of the Trading with the Enemy Act to the facts of this case. That Act, in s. 1, provides that any persons who trade with the enemy within the meaning of the Act, shall be guilty of an offence of trading with the enemy. Then it sets out the penalties for that offence. Sub-s. 2 is, so far as relevant, in the following terms. [His Lordship read the material part of sub-s. 2.] It was held by Hawke J., that payment by the respondent company of the sum claimed in this action would be a breach of the Act in three respects. Firstly, he said that it would be a dealing for the benefit of an enemy, and would therefore come within the general words which I have already read. Secondly, he held that the payment would be a payment for the benefit of an enemy, and thirdly he held that the effect of paying would be to discharge an obligation of an enemy. The definition of "enemy" is contained in s. 2.; I need not read it, because there is no question in the present case that the German company is an enemy within the meaning of the Act.

It was argued by Mr. Havers that in construing the general words "for the benefit of an enemy," a narrow meaning should be attributed to them, in the sense that they should be limited to cases where, by some device or some circuitous means, an attempt was being made to get some benefit into the hands of an enemy, and he said that the words should not be construed in such a way as to cover a perfectly bona fide pre-war financial transaction merely because one of the indirect results of it would be to benefit an enemy. In support of that argument he referred to a judgment of the Court of Criminal Appeal in *Rex* v. *Kupfer* (1), and in particular to some observations by Lord Reading in delivering the judgment of the Court in that case, in which he puts, as an object of the legislation and in particular of these words (they were the corresponding words in the legislation then in force) the avoidance of indirect devices and tricks and so forth designed to evade the purpose of the Act. I am quite unable to accept the argument that that case is any authority for saying that the words to which I am referring should be construed in such a way as to confine them to that class of transaction. The language of the judgment in that case does not, to my mind, suggest for one moment that any such limited construction was intended to be placed upon the words by the Court. Indeed, on no principle of construction known to me, would it have been possible to have limited the perfectly simple and general words "for the benefit of" in such a way. On the contrary, in my opinion those words are of the widest possible character, and they are wide enough to sweep in any transaction of which it can be truly said (and this is a question of fact in each case) that it is for the benefit of an enemy.

At what particular point the line would have to be drawn, what particular degree of benefit, what questions of remoteness might arise, will depend on the facts of each individual case, and it would be improper to attempt to suggest any limitation for those words. It is worth bearing in mind that a wide interpretation of a phrase of that kind in legislation of this character is all the more justified in the present case in that the Act makes provision under which, in a case of great

(1) [1915] 2 K. B. 321.

hardship or a case which might technically come under the words of the Act but nevertheless would produce no practical injury to the State, the matter can be dealt with under a provision by which a Secretary of State or the Treasury or the Board of Trade can grant a licence. That seems to me to be a further justification for giving the words what I must confess to me appears to be their natural construction, which is an extremely wide and all-embracing one.

I now come to consider the substantial questions in this case, and in the first place, it falls to be considered whether the payment of the instalment now in question would be for the benefit of the German company. It seems to me clear that it would be. The effect of the payment would be, in the first place, to preserve for the German company the substantial benefit of the discount, a benefit which it loses if no payment is made. Secondly, the German company, by payment, would be relieved of its obligation to the appellants pro tanto. That relief is unquestionable. It is true that the German company on such payment being made would come under a liability to pay a corresponding amount to the respondents. Whether or not that result, on balance, and looking at figures alone would be a benefit to the German company, it is impossible to know. For all we know, it may be that the English company is a book debtor to the German company. It seems to me that that is not a thing into which this Court can inquire. We are confronted with the fact that a liability to a neutral company would be discharged, and there would be substituted for it, putting it at the highest, a liability to a British company, a liability be it observed which that British company could not enforce during the war. There is nothing to prevent the appellants, so far as we are entitled to assume, from suing the German company and obtaining payment when the due date arrives. That date may be in 1944, or, under clause 7, it may be earlier; but the effect would be to substitute a British creditor for a neutral creditor, and that seems to me to be a benefit to the German company. Accordingly, in my opinion, the learned judge was right in holding that the case comes within the general words of s. 1, sub-s. 2 (*a*). He was also right, in my opinion, in holding that it came within the words " paid . . . . money . . . . to or for the benefit "of an enemy," under sub-para. (ii.) of para. (*a*). My reasons for taking that view are the same as those which I have given in dealing with the general words, and I can add nothing to them.

I am also of opinion that payment by the respondents would discharge an obligation of the German company. That requires very little to be added to what I have already said. It was suggested by Mr. Havers that mere payment of this sum would not operate to discharge the German company of its obligation to his clients; that that discharge would only take place if and when an assignment of the appropriate part of the debt to the respondents was made, and he said that all that he was asking for was payment; why should he not have payment even if the assignment was a thing which he would not be entitled to make? Here comes the materiality of the point which I mentioned in relation to the form of the statement of claim. The right of the appellants is to receive payment for the commodity which they have agreed to sell, namely, part of the German company's debt, and they will not be entitled to receive payment unless they are ready and willing and are prepared against payment to make the assignment. Accordingly, it never could be the case that they would be entitled to receive payment and leave the assignment, so to speak, held up. The two transactions, payment and assignment, are part of one and the same thing. That was the contract entered into. It is one and indivisible, and if the carrying out of that contract by payment and assignment is going to result in the extinguishment of the German company's obligation to the appellants, it seems to me that it cannot be questioned that the carrying out of it will be a discharge of the obligation of an enemy. It is, in my opinion, nothing to the point to say that contemporaneously with such discharge the German company comes under a liability to the respondents. It does not seem to me that this case would in any way alter the fact that the obligation of the enemy to the appellants had been discharged. Reliance was placed in connection with that matter upon a recent decision of Macnaghten J. in the case of *R. & A. Kohnstamm* v. *Ludwig Krumm* (*London*), *Ld.* (1).

That was a simple case of principal and surety, and Macnaghten J. took the view that where a surety discharges the debt of the principal debtor, and thereby becomes entitled to recover a corresponding amount from the principal debtor, it is not correct to say that the obligation of the principal debtor has been discharged within the meaning of the relevant words of the Trading with the Enemy Act, 1939. The facts of that case were quite different from the facts of the present case, and the point dealt with by Macnaghten J. was not a point which it falls to this Court to consider. It would therefore not be proper for this Court, not having heard the question argued to the full whether that judgment is right or not, to express any opinion about it one way or the other. It is sufficient to say that it lays down no principle which governs the special facts of the present case, and I obtain no assistance from it.

That disposes of the substantial matters which arise in the appeal, but a further point was taken by Mr. Havers which we understand was not taken below. It was of this nature: he said that even though payment of the amount of this instalment would be an offence against the Act, and therefore is not permissible at the present time, he is entitled at any rate to a judgment which will declare and settle his rights, although he agrees that if he were entitled to such a judgment he would have to submit to some sort of stay to prevent payment from being made during the continuance of the war or until a licence was obtained. He says that his substantial right is undisputed on the merits, and that the only thing that is prohibited by the Act is payment, and provided no payment is made, no offence will be committed. I cannot take that view. He is claiming payment of a sum of money, and he is claiming it at a time when the law of this country declares that the thing which he is asking for, namely payment, is illegal, and the fact that illegality has struck what in its origin was a perfectly innocent and proper transaction is, it seems to me, an answer to the claim. It is true that so far as anything in this Act of Parliament is concerned, the prohibition of payment is a temporary one. It only exists so long as the payee, or the person to receive the benefit, is an enemy. If and when he ceases to be an enemy, and in the absence of further legislation affecting his rights, he will, according to ordinary principles, be entitled to receive the benefit which was to flow to him under the machinery of these agreements. At the moment, that benefit is prohibited, and it seems to me that that circumstance in this case is a defence to the action. It was suggested by Mr. Havers, although he did not pursue it (and in fact in the end said he did not rely upon it) that the dismissal of the present action might operate so as to allow the defence of res judicata to be set up in the event of an action being brought after the war or after a licence had been obtained, if it could be obtained. There is really nothing in that point because the fact that the action cannot be brought at this time does not mean that it is going for ever to be incompetent. The true analogy seems to me to be the case of an action prematurely brought. The dismissal of such an action would not prevent the plaintiff bringing another action when the proper time had elapsed. I therefore say nothing more about that. On principle I should have felt no doubt that the plea of the statute was a defence to the action, and that when once it was established, the action should be dismissed with the usual consequences. But our attention was called to a decision of Rowlatt J. during the last war in the case of *Schmitz* v. *Van der Veen & Co.* (1). That was a case where the plaintiff had a business agreement with a German in Germany, under which the plaintiff purchased goods from the German, sold them in London, and the excess of what he received over a certain fixed sum was to be divided equally between himself and the German, and he was also to receive a commission. The action was by the plaintiff against defendants to whom he had sold the goods, and the defendants raised the point that the plaintiff could not recover because, having regard to the arrangement between the plaintiff and

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(1) [1940] 2 K. B. 359.

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(1) 112 L. T. 991.

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the German, the German would be entitled to his proper contractual share of the profit on the transaction. On that matter the learned judge, in dealing with the case, took the view that he could give judgment for the plaintiff provided the order was so framed as to ensure that no part of the money paid should find its way into the hands of the German. The case was quite different from the present case in this respect: what was being dealt with was a sum of money in this country, to a proportion of which the German was entitled. There was then, as there is now, machinery for vesting in the Custodian of Enemy Property the rights of enemies to property of that kind. The business was a business for the joint benefit of a British subject and a German. One result of the claim set up by the defendants would have been that the British subject would not have got his share of the money; but that machinery being in existence so that, if a vesting order were made, no possible objection could be taken to the payment (because payment to the Custodian would not be payment for the benefit of an enemy and an offence under the Act), the learned judge made an order under which he stayed execution until a summons for a vesting order should be taken out and dealt with. If a vesting order had been made, as it might very well have been made, before the action was instituted, it seems to me there would have been no defence under the Trading with the Enemy Act at all, because the result of the defendants in that case making the payment which they were liable to make would have been that the German's share of it would have gone to the Custodian, and there would have been no offence committed. In the present case, the benefit which the German company would obtain would be a benefit which no vesting order made in this country could prevent it from obtaining. It is a benefit which accrues to it automatically the moment the payment is made, and there is no possible means of stopping it by a vesting order or otherwise. It seems to me, therefore, that the view which I have taken as to the proper way of dealing with the present case in no way conflicts with the view taken by Rowlatt J. as to the appropriate method of dealing with the case before him. The consequence is that the appeal fails and must be dismissed with costs.

MACKINNON L.J. I agree, and there is nothing which I can add. There is nothing in the judgment of the Master of the Rolls which I can express better, so I will add nothing.

DU PARCQ L.J. I also agree, for the reasons already expressed by the Master of the Rolls and concurred in by MacKinnon L.J., and I abstain from adding anything.

Appeal dismissed.

Solicitors: *Slaughter & May; Kenneth Brown, Baker, Baker.*

H. C. G.

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DAVIS *v.* CAMBRIAN WAGON WORKS, LIMITED.

Workmen's compensation—Accident—Compensation—"Weekly Payment for not less than six months"—"Liability therefor"—Award increasing the rate of compensation—Increased rate paid for less than six months—Application to redeem the increased rate of compensation—Jurisdiction of arbitrator to entertain application—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 13.

By s. 13 of the Workmen's Compensation Act, 1925, "Where "any weekly payment has been continued for not less than six "months, the liability therefor may, on application by or on "behalf of the employer, be redeemed by the payment of a lump "sum . . . ."

A workman in April, 1938, met with an accident in the course of his employment and was totally incapacitated. He was paid by his employers at the rate of 1*l.* 8*s.* 5*d.* per week. In August, 1940, after paying the compensation for more than six months, the employers made an application to redeem the weekly payment by payment of a lump sum. The workman then applied for an increase of the compensation from 1*l.* 8*s.* 5*d.* to 1*l.* 10*s.* a week, and also for a further sum of 5*s.* a week under the Workmen's Compensation (Supplementary Allowance) Act, 1940. The employers submitted to an award increasing the amount of compensation including the supplementary allowance to 35*s.* a week and paid the increased weekly payment of 30*s.* for a few weeks but for less than six months. The employers amended their application to redeem to one to redeem the weekly payment of 30*s.*, but they expressly disclaimed any intention of redeeming the supplementary allowance of 5*s.* a week. The county court judge held that inasmuch as the employers had made weekly payments of compensation under the Act for a period of not less than six months they had complied with the conditions laid down in s. 13 of the Act of 1925, and were therefore entitled to make the application to redeem, but that they were not entitled to redeem the weekly payment of 30*s.* without also redeeming the supplementary allowance of 5*s.* a week:—

Held, by the Court of Appeal that under s. 13 of the Act of 1925 an employer is only entitled to redeem a weekly payment of a known amount, payment of which has continued for a period of not less than six months, and that as in the present case the weekly payment of 30*s.* had been made by the employers for a period of less than six months the county court judge had no jurisdiction to entertain an application by the employers to redeem the weekly payment of that amount.

APPEAL from an award of the judge of the Bristol County Court upon an application by the employers for the redemption

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of compensation awarded under the Workmen's Compensation Acts.

On April 6, 1938, the workman, Charles Davis, who was in the employ of the Cambrian Wagon Works, Ld., was knocked down whilst he was working at some sidings belonging to the Great Western Railway, and sustained severe compound fractures of both legs resulting in amputation of both legs above the knee, and since that time he had been totally incapacitated from earning wages in any known sphere of employment. He was paid compensation on the basis of total incapacity at the rate of 1*l.* 8*s.* 5*d.* a week.

On August 7, 1940, an application was made by the employers, under s. 13 of the Workmen's Compensation Act, 1925 (1), to the Bristol County Court to redeem their liability to pay that compensation by payment of a lump sum.

On September 10, 1940, the workman filed an application for review, claiming, on account of the increase of wages which had taken place, an increase in the rate of compensation from 28*s.* 5*d.* to 30*s.* a week as from August 3, and also claiming an addition of a further sum of 5*s.* a week under the Workmen's Compensation (Supplementary Allowances) Act, 1940, as from August 19, 1940, and both these applications came up for decision by the judge of the Bristol County Court on October 25, 1940.

In the meantime, on October 14, 1940, the employers submitted to an award on the application for review in the terms claimed by the workman in those proceedings, namely, that the standard compensation under the Workmen's Compensation Act should be increased to 30*s.* a week, and that a further sum of 5*s.* a week should be paid under the Workmen's Compensation (Supplementary Allowances) Act, 1940.

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(1) Workmen's Compensation Act, 1925, s. 13: "Where any "weekly payment has been con"tinued for not less than six "months, the liability therefor "may, on application by or on "behalf of the employer, be "redeemed by the payment of a "lump sum of such an amount as, "where the incapacity is per"manent, would, if invested in "the purchase of an immediate "life annuity from the National "Debt Commissioners through the "Post Office Savings Bank, pur"chase an annuity for the work"man equal to seventy-five per "cent. of the annual value of the "weekly payment, and as in any "other case may be settled by "arbitration under this Act . . . ."

The result was that the judge of the Bristol County Court on October 25, 1940, by consent, made an award in the application for review increasing the amount of compensation including supplementary allowances to 35*s.* a week.

The application to redeem was limited to an application to redeem the standard amount of compensation, that is to say, the employers did not seek in these proceedings to redeem the supplementary allowance of 5*s.* a week. The employers amended their claim, which was a claim to redeem the original sum of 1*l.* 8*s.* 5*d.* to one to redeem the standard compensation at the rate of 30*s.*, and they definitely disclaimed any intention whatever in those proceedings of redeeming the supplementary allowance of 5*s.* a week.

It was agreed that the only question in those proceedings was whether the employers were entitled to redeem the standard compensation without redeeming the additional payment made under the Act of 1940.

The county court judge held that the words " any payment " in s. 13 of the Act of 1925 meant a payment of compensation under the Act, and not a payment of a particular amount, and that therefore the conditions for making a claim under s. 13 were satisfied in this case. He held, however, that the employers were not entitled to redeem the standard compensation under the Act of 1925 and leave the supplementary allowance under the Act of 1940 outstanding, and he accordingly dismissed the employers' application to redeem the standard compensation of 30*s.* a week.

The employers appealed. The appeal was heard on January 30, 1941.

Gilbert Paull K.C. and *R. M. Everett* for the appellants. The first question that arises is as to the jurisdiction of the county court judge to entertain the application to redeem. The employers had made a weekly payment of 1*l.* 8*s.* 5*d.* for more than six months, but had not made the weekly payment of 30*s.* for more than a few weeks. Sect. 13 of the Workmen's

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Compensation Act, 1925, provides that "where any weekly "payment has been continued for not less than six months "the liability therefor may, on application by or on behalf of "the employer, be redeemed by the payment of a lump "sum. . . ." The question whether the right of the employer to redeem depends upon the full weekly payment having been continued for six months, or whether it arises upon any weekly payment having been continued for that period has never been determined, but there are conflicting dicta upon the point. In *Clawley* v. *Carlton Main Colliery Co.* (1) Lord Finlay L.C. expressed the view (2) that "the redemption is "to be of a weekly sum which has been actually paid for not "less than six months." Lord Wrenbury said (3) that he must not be taken to assent to the Lord Chancellor's expression of opinion. Lord Sumner (4) agreed with the opinion delivered by Lord Wrenbury. Lord Haldane said (5): "I think that "the expression in clause 17 'liability therefor' must mean "a liability to the actual amount paid weekly only in cases "where the amount of the weekly payment covers the "liability."

Sankey L.J. in *Edward Curran & Co., Ld.* v. *Kays*, after reading s. 13, said (6): "The difficulty, in my view, arises "upon the words 'liability therefor'. What does the section "mean? Does it mean that the liability for that particular "weekly payment may be redeemed, in which case certain "automatic rules would apply and it would hardly be "necessary to go to the Court at all, or does it mean that the "liability under this Act may be redeemed? I think it means "the latter and that, 'Where any weekly payment has been "'continued for not less than six months, the liability therefor' "—that is the liability for payment during the incapacity "of an amount calculated in accordance with the rules under "s. 9—'may be redeemed.'"

[CLAUSON L.J. In the present case the employers have not paid the 30*s.* a week, which they are seeking to redeem, for a period of six months, and therefore the county court judge had no jurisdiction to entertain the application.]

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(1) [1918] A. C. 744.
(2) Ibid. 751.
(3) Ibid. 759.
(4) Ibid. 755.
(5) Ibid. 755.
(6) [1928] 2 K. B. 469, 481.

The words "liability therefor" in s. 13 mean liability to make payments under the Act, and not liability to pay any particular weekly payment which may have been paid for six months. The employers in the present case have made weekly payments under the Act for a period of not less than six months, and consequently the county court judge had jurisdiction to entertain the application to redeem the weekly payments of compensation. The employers have a right to redeem a weekly payment of compensation if they can bring themselves within the terms of the statute: *Calico Printers' Association, Ld.* v. *Higham* (1).

F. A. Sellers K.C. and *Stephen Benson* for the respondent were not called on to argue.

Scott L.J. This is an appeal from an award of Judge Wethered upon an application by the employers to redeem a weekly payment under the provisions of s. 13 of the Workmen's Compensation Act of 1925 with a supplementary question which does not fall for our decision arising out of the recent Act of 1940. The learned county court judge took an erroneous view of the law on the first point, and it is conceded that if his view on the first point was wrong the second point upon which the employers in the case were anxious to obtain a decision does not arise.

The workman in this case had been injured in an accident in April, 1938, when he lost both legs. Payment at the rate of 1*l.* 8*s.* 5*d.* under the Act was made in respect of that disability. On August 7, 1940, the employers applied for redemption of the weekly payment, and in their particulars, the answer to para. 4 of the statutory form asking for the "date of "agreement, decision, award, or certificate fixing weekly "payment, amount of such payment, and date from which it "commenced", was given as "Compensation of 1*l.* 8*s.* 5*d.* per "week paid to respondent since date of accident". The provision of s. 13 of the Act relating to redemption of weekly

(1) [1912] 1 K. B. 93.

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payments is as follows: "Where any weekly payment has "been continued for not less than six months, the liability "therefor may, on application by or on behalf of the employer, "be redeemed by the payment of a lump sum of such an amount "as, where the incapacity is permanent, would, if invested in "the purchase of an immediate life annuity from the National "Debt Commissioners through the Post Office Savings Bank, "purchase an annuity for the workman equal to 75 per cent. "of the annual value of the weekly payment, and as in any "other case may be settled by arbitration under this Act". At a later date than the original payment of compensation at the rate of 1*l.* 8*s.* 5*d.*, namely, towards the end of September, 1940, the weekly payment was raised to 30*s.* It is unnecessary to go into the reasons why it was raised, but it was. At the date of the hearing before the learned county court judge, which was on October 25, 1940, the payment of 30*s.* had been running for only a week or two, and consequently had not been continued for not less than six months. Mr. Paull submitted to us that the expression in the third line of the section "the liability therefor" did not mean liability for the particular payment that had been continued for not less than six months, but the liability in general to make compensation by way of a weekly payment under the Act, and that consequently he would be entitled, upon an amendment of his application which was made by consent, to redeem as for a payment of 30*s.* a week on the ground, he contended, that such a payment came within the section. In my view that contention is untenable. The primary object of the provisions of the section is to enable a weekly payment of a known amount to be converted into a capital payment equal to three-quarters of the capital value of the weekly payment on a certain actuarial basis as regards interest tables. It is of the essence of the section that the weekly payments should be of a known amount. In my view, on the plain language of the section, that is its effect. But I think that the matter has been really concluded by the decision of the Court of Appeal in the case of *Calico Printers' Association* v. *Higham* (1). It will be enough if I read a passage from the judgment of Cozens-Hardy M.R. in that case (1): "Compensation under the Act is "payable where incapacity for work, whether total or partial, "results from an injury. It is given in the form of a weekly "payment lasting during the incapacity." Then he refers to the provisions for review, and then deals with clause 17, which contained at that time the provisions for redemption, and which so far as material to this case is in the same language as s. 13 of the Act of 1925. He read the words that I have already read, and continued: "Now, three points are clear: "(*a*) The right to redeem is given to the employer only; there "is no corresponding right given to the workman to claim a "capital sum. (*b*) This right cannot be exercised hastily; "the weekly payment must have been continued for at least "six months. (*c*) A broad distinction is drawn between an "incapacity to work which is 'permanent' and one which is "not 'permanent'. This distinction may sometimes be to the "benefit of the workman and sometimes to his detriment. "The arbitrator has, if the incapacity is 'permanent,' no "discretion as to the amount. He cannot award less or more "than 75 per cent. of the actuarial value. If it is not "'permanent' the arbitrator must fix the lump sum in his "discretion, having regard to the evidence before him," and so on. Then towards the end of that paragraph the Master of the Rolls said (2): "He must start with the assumption that "the existing weekly payment is proper; but he must go "further, and ascertain as best he can whether that payment "is likely to be proper during the rest of the man's life." That was only for the purpose of ascertaining how far the payment was permanent, in other words, stabilised, so as to make conversion from weekly payment into capital payment at a fair valuation.

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(1) [1912] 1 K. B. 93.

I do not think it is necessary to add anything further upon the arguments addressed to us, because, in my view, the only question in the case is whether the learned county court judge was right or wrong in refusing to apply the provisions of s. 13, that the payment which, as a matter of arithmetic, was to be converted into a capital payment was one which had continued for six months. He took the view that he was not so bound. I think he was. Consequently on that point the learned county court judge took a wrong view of the case, and his decision upon the other part of the case upon which Mr. Paull on behalf of the appellants wants to obtain a judgment from this Court does not arise. The appeal, therefore, must be dismissed with costs.

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(1) [1912] 1 K. B. 96.

(2) Ibid. 97.

Clauson L.J. This is a somewhat unfortunate case. The parties really concerned—and by that phrase I do not necessarily mean the persons whose names appear on the record—were minded to obtain a decision from the Court on an interesting question whether or not an employer has the right to redeem what I may call the normal weekly payment apart from the supplementary allowance payable under the Act of 1940, without redeeming the supplementary allowance. Of course, the question could be only raised by the employers making an application to redeem and when they did make the application to redeem the point on which they desired a decision obviously could not arise unless they were in a position to redeem what I have spoken of as the normal weekly payment, apart from the supplementary weekly increase under the Act. As ill luck would have it they seem to have hit on a case where it turned out that it was not just that the weekly payment to the workman, which had been in fact made, of 1*l*. 8*s*. 5*d*. should continue at that amount, but that it should be increased to a weekly payment of 1*l*. 10*s*. On that everyone agreed. The parties who were concerned in the litigation said: "That does not matter very much, the point we want to discuss "is about the supplementary allowance. Let us assume that "the 1*l*. 10*s*. which we are now agreed is the proper weekly "allowance ought to be redeemed," and they induced the learned county court judge to proceed upon that footing. Ultimately he dismissed the application because he did not think that the employers' application to redeem the weekly payment of 30*s*. and leave the supplementary allowance of 5*s*. a week unredeemed ought to be acceded to. We are asked to deal with this case on the same footing and decide whether or not his view as to dealing with supplementary allowances is right or not. We cannot do that unless he had jurisdiction to redeem what I have spoken of as the 1*l.* 10*s.* payment. If the 1*l.* 8*s.* 5*d.* had never been altered to 1*l.* 10*s.* no difficulty would have arisen, but it was; and the Act is perfectly plain that an employer is not entitled to redeem a weekly payment unless that weekly payment has been made for six months. For myself I should have thought on the section alone that it is perfectly plain that it means that, but even if I did not think so it would be impossible to decide otherwise in this Court because both Cozens-Hardy M.R. and Fletcher-Moulton L.J. in the *Calico Printers' Association* case (1) to which my Lord has referred have in plain terms stated it to be essential that there should have been an actual payment of a certain constant amount for six months. We were referred to a dictum of Lord Finlay in *Clawley* v. *Carlton Main Colliery Co.* (2) which seems to take precisely the same view. We were also referred to some observations of Sankey L.J. in *Edward Curran & Co., Ld.* v. *Kays* (3) in this Court, which it was suggested were consistent with a different view. As I read his observations I do not think he was dealing with this point at all or meant to deal with it, or that his view can be taken to be anything different from those expressed by Cozens-Hardy M.R. and Fletcher-Moulton L.J. and by Lord Finlay.

It was suggested as a last resort that Cozens-Hardy M.R. and Fletcher-Moulton L.J. were not prepared to express any opinion about a point which they did not think arose in the case, and that that was some indication that they differed from Lord Finlay who had, for the purposes of his dictum, expressed an opinion. That seems to me to be quite wrong. However that may be, the decision of this Court has been clear about it, and the county court judge ought to have said: "I am not going on with this case because the employers "cannot redeem the weekly payment of 30*s.*, so the question

(1) [1912] 1 K. B. 93.
(2) [1918] A. C. 744, 751.
(3) [1928] 2 K. B. 469, 481.

"whether they can redeem the 30*s.* without redeeming the "supplementary allowance of 5*s.* a week does not arise." However, he ultimately made the right order, because he dismissed the application. Accordingly the appeal must be dismissed with costs.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *James Turner & Son & Whitehouse, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

Solicitors for respondent: *Burn & Berridge, for James Wilson & Kinsey, Wigan.*

R. F. S.

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1941

Feb. 4, 5.

REX *v.* A. B.

Criminal law—Diplomatic privilege—Employee at foreign embassy—Dismissal—Waiver of privilege by ambassador—Extension of privilege for reasonable time after dismissal—Diplomatic Privileges Act, 1708 (7 *Anne, c.* 12), *s.* 3.

The appellant was employed as code clerk at a foreign embassy to this country. He was dismissed by the ambassador and immediately arrested on charges under the Official Secrets Acts, and of larceny of documents at the embassy. He claimed diplomatic immunity for a reasonable period after the cesser of his employment to enable him to make arrangements to leave this country. The ambassador waived any right to diplomatic immunity :—

Held, that the immunity was that of the ambassador and could be waived.

Held, further, that the extension of the immunity for a reasonable period after the cesser of office usually granted to diplomatic agents does not apply to a case where the agent has been dismissed and the immunity waived by the ambassador.

Held, further, that although the said documents were part of the archives of the embassy they could be the subject-matter of a charge of larceny in an English court, or of a charge under the Official Secrets Acts.

APPEAL against conviction.

The appellant was employed at the embassy of a foreign power in England as a code clerk. On May 21, 1940, the Government of the country represented by the said embassy dismissed him from their service. On the same day he was arrested on charges under the Official Secrets Acts and of larceny of certain documents which were copies of documents, and would, in the ordinary course, have been discarded. On May 20 or 21 the ambassador waived any right of diplomatic privilege. At the trial the appellant claimed diplomatic privilege, but the claim was overruled by Tucker J., and the appellant was convicted and sentenced to seven years penal servitude.

He now appealed against the conviction.

The appellant in person. Diplomatic privilege is not that of the ambassador only but extends to the members of his staff. It is their independent privilege and cannot be waived by the ambassador; and in any event can only be waived by him with the consent of his Government: *In re Suarez* (1), and *In re Republic of Bolivia Exploration Syndicate* (2). That privilege extends over a reasonable period after service with the embassy ceases (*Musurus Bey* v. *Gadban* (3)) and I was entitled to have my immunity so extended. In fact, I was immediately arrested.

[HUMPHREYS J. In that case Davey L.J. said (4): "In "handing over the affairs of the embassy to his successor the "ex-ambassador is still engaged on his sovereign's business, "and must have a reasonable time allowed for that purpose." Do you suggest that that is your case?]

No, but nevertheless I am entitled to the same privilege although I was dismissed. An employee might be dismissed for political reasons.

[SINGLETON J. The cases cited only deal with cases of recall, not dismissal.]

In *Marshall* v. *Critico* (5), which seems to be against me on that point, the person claiming privilege was a consul-general, whose position differs widely from that of a diplomatic agent.

[Oppenheim's International Law, 5th ed., vol. i., p. 633, para. 402; *Assurantie Compagnie Excelsior* v. *Smith* (6); *Magdalena Steam Navigation Co.* v. *Martin* (7); *Engelke* v. *Musmann* (8) and the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), were also referred to.]

In taking these documents I was doing an act as an official as far as the British Government was concerned, and my purpose in doing so cannot be inquired into by a British court (Oppenheim's International Law, 5th ed., vol. i., p. 224, para. 115), even though I took them against the will of the ambassador of the sovereign state. The jurisdiction of British courts does not extend to protecting the foreign sovereign against the acts of its subordinates. A crime committed in a foreign embassy—especially by its nationals, cannot be tried here, for the embassy is foreign soil. If a sailor on a foreign public ship commits larceny on that ship he cannot be tried here, even though the ship was in British waters at the time.

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(1) [1918] 1 Ch. 176.

(2) [1914] 1 Ch. 139.

(3) [1894] 2 Q. B. 352.

(4) Ibid. 362.

(5) (1808) 9 East, 447.

(6) (1923) 40 Times L. R. 105.

(7) (1859) 2 El. & El. 94.

(8) [1928] A. C. 433.

[The appellant also submitted that the learned judge had misdirected the jury in certain particulars and that certain documents, which were not produced, ought to have been produced. The argument and judgment on these points are omitted.]

Sir William Jowitt S.-G. and *McClure* for the Crown were not called upon to argue.

The judgment of the Court (Lord Caldecote C.J., Humphreys and Singleton JJ.) was delivered by

Lord Caldecote C.J. The appellant was convicted at the Central Criminal Court upon an indictment containing a number of charges, some of them under the Official Secrets Acts, 1911 and 1920, and one of them a charge of larceny. He was a code clerk in a foreign embassy in this country at the time of the commission of the offences of which he was found guilty, having been appointed to that position some time in October, 1939. It was decided by his Government to discharge him on May 20, 1940, and the appellant was informed of that decision, and was accordingly dismissed by letter handed to him on May 21, 1940. On the same day, or perhaps the day before, the ambassador had waived any right of diplomatic privilege, and his waiver was confirmed by his Government. The appellant was charged with the offences of which he was afterwards convicted on August 1, 1940, having been detained in custody since May 20.

The appellant at his trial claimed diplomatic privilege, meaning, as he has contended before the Court on this occasion, that having been a member of the staff of the said ambassador, he could not be tried for an offence committed while he was a diplomatic agent or a member of the diplomatic staff, and was not liable to arrest. The appellant on this occasion has conducted his own defence because, as he has told us, he knows more about his case than anyone else. I am quite sure that he has given us all the assistance in his power, but as will appear later, it is not easy to state his points as points of law in the way in which he put them before us.

The appellant's main contention, with which I will deal at once, is that he was entitled to diplomatic privilege throughout the whole term of his employment and for a reasonable time thereafter, a reasonable time being, as he submitted, such time as was sufficient to enable him to make arrangements to leave the country freely as he entered it freely. He further contends, as indeed he must if he is to make good his first contention, that waiver by his Government and by the ambassador was ineffective to deprive him of diplomatic privilege. I find it unnecessary to decide whether or not the diplomatic privilege of the character discussed before us can be claimed by a member of a diplomatic staff in connection with a criminal charge; but assuming that it can, the appellant relies for his main contention on a statement which is to be found in Oppenheim's International Law, 5th ed., vol. i., p. 636 (note), to the following effect: "It may be "stated as a general principle that, at any rate according to "English law, the immunity of an envoy from civil process "continues after the termination of his diplomatic mission "for such reasonable period as is necessary to enable him to "wind up his official business," and *Musurus Bey* v. *Gadban* (1) and *In re Suarez* (2) are cited. I will refer to those cases later.

The first thing to be said is that the privilege claimed by the appellant is a privilege which is derived from, and in law is the privilege of, the ambassador and ultimately of the State which sends the ambassador. It was a privilege which was originally based on the comity of nations, before it was declared by 7 Anne, c. 12, in 1708. Lord Buckmaster, in the case of *Engelke* v. *Musmann* (3) said: "My Lords, the privilege "affording ambassadors and other accredited representatives "of foreign countries immunity from all writs and processes is "an ancient doctrine of the common law declared in terms by

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(1) (1894) 2 Q. B. 352.
(2) [1918] 1 Ch. 176.
(3) [1928] A. C. 433, 440.

"the statute 7 Anne, c. 12"; and the statement that I have made that the privilege is the privilege of the ambassador was stated by Lord Hewart C.J. in his judgment in *Dickinson* v. *Del Solar* (1). "The privilege is the privilege of the Sovereign "by whom the diplomatic agent is accredited, and it may be "waived with the sanction of the Sovereign or of the official "superior of the agent." Then he refers to two cases, *Taylor* v. *Best* (2) and *In re Suarez* (3).

Further, in *Marshall* v. *Critico* (4) Lord Ellenborough says: "This is not a privilege of the person, but of the State which he "represents."

The cases which have been relied upon by the appellant, which are to be found in the note that I have read from Oppenheim's International Law, 5th ed., vol. i., p. 636 (note), are not any authority for the proposition that an official after dismissal and waiver of diplomatic privilege by the ambassador or by his country, can continue to claim the protection of the privilege. The privilege is the privilege of the ambassador and not of the individual, and therefore, from the moment of waiver by the ambassador and a fortiori by his Government, the privilege ceases. The cloak of the ambassador no longer covers the individual and the individual then becomes liable to any process of law to which ordinary people are subject. If not, the strange result would follow that a member of an ambassador's staff who had been dismissed and in respect of whom there had been a waiver of privilege, could snap his fingers at the law of the country to which his ambassador was accredited for an indefinite period called a reasonable time.

The first of the two cases to which I have referred, is the case of *Musurus Bey* v. *Gadban* (5). In the Court of first instance, Wright J. said (6): "Lord Ellenborough, in "refusing to allow the privilege, did it simply on the ground "that the State by whom the ambassador was accredited had "dismissed him from his office, and, therefore, that he was "disentitled to claim the privilege of an ambassador. The

(1) [1930] 1 K. B. 376, 380.
(2) (1854) 14 C. B. 487.
(3) [1918] 1 Ch. 176.
(4) 9 East, 447.
(5) [1894] 2 Q. B. 352.
(6) [1894] 1 Q. B. 533, 541.

"existence of the general privilege of an ambassador—namely, "that he is exempted from being sued in the courts of the "country to which he is accredited—has not been seriously "contested. It was said that there is no English authority "for the proposition that the privilege continues until the "return of the ambassador to his own country, or, at any "rate, so long as he is reasonably and properly occupied in "winding up the affairs of his embassy and preparing to "return there. We think that there is sufficient authority "in the text-books which were cited to show that the privilege "may continue in the manner which the defendant's counsel "contended for; and, even if there were no authority to that "effect, we should come to the same conclusion on principle." In the Court of Appeal, in the same case, Davey L.J. said this (1): "Paragraph 2 of the reply avers that 'Musurus "'Pacha remained in England only for the purpose of making "'the necessary preparations for his departure, and no longer "'than was necessary for the purpose.' Nothing to the "contrary is stated in the special case, and there is nothing "from which we can infer that he stayed longer than a reason-"able time. I am therefore of opinion that the privilege "continued until his return to Turkey, as it appears to me it "would be almost an outrage on common sense to say that the "privilege ceases the moment he has presented his letter of "recall."

So far as the other case is concerned, *In re Suarez* (2), it was held by Swinfen Eady L.J. and Warrington L.J. that (see headnote) "An ambassador or public minister can with the "consent of his Government effectually waive his privilege "and that the minister's immunity had ceased," but it is assumed in that case that, apart from waiver, the privilege extends for a reasonable time after the ambassador or other minister has ceased to hold office in order that he may wind up the affairs of the legation and transfer them to his successor. In neither of these cases do I find any reference at all made to what the consequences might be of waiver of privilege by the ambassador whose privilege it was originally, or waiver by the State, in a case in which the person claiming the privilege was dismissed from the post which he had held. They were dealing with the ordinary case which arises when the period of service of an ambassador or of his staff comes to an end; and those cases are authority for the proposition that the privilege extends to a reasonable period after the duties of the ambassador, or of the member of his staff, have been concluded; but they are not any authority for the proposition that when the person claiming the privilege has been dismissed and the ambassador for the country has waived the privilege, notwithstanding that waiver, the official can still claim to be entitled to its protection.

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(1) [1894] 2 Q. B. 362.

(2) [1918] 1 Ch. 176.

One further observation I may make on this point is that the appellant has quite rightly submitted that the privilege is derived from, or is based on, the comity of nations. It is now enshrined in the Act of Anne, but the comity of nations would be a strange source for the doctrine for which the appellant contends, for it would lead rather to the embroilment of nations than to their comity if, notwithstanding the dismissal of the person claiming the privilege and waiver of the privilege, he was still to be entitled, contrary to the interests of the country in which he had been serving, to commit criminal offences with impunity. In our judgment, there is not any authority for the proposition for which the appellant contends, that in spite of his dismissal and in spite of waiver, he can claim immunity from a criminal charge.

I now proceed to deal with the other points which the appellant has taken. The first is that the Official Secrets Acts of 1911 and 1920 do not apply to acts done by a diplomatic agent in respect of the archives of the diplomatic mission in which he is employed. This is one of the points that I am not sure that I have correctly appreciated from the appellant's argument. I understand his argument broadly to be that if he was doing acts in respect of documents in the embassy, he could not be charged with an offence under the Official Secrets Acts. It is very difficult to state the proposition in a form in which it is intelligible, but as I understand it, I think that it is really the contention, or part of the contention with which I have already dealt, that if he was doing an act in connection with the business of the embassy, he was immune from prosecution; indeed, that he was unable to commit an offence under the Official Secrets Acts at all. If I have correctly understood his argument, I am bound to say that I see no foundation for it. The Official Secrets Acts and the provisions under which he was charged are capable of applying to the circumstances of this case just as much as if he had obtained a document from a department of the Government in this country.

The next point which is taken by the appellant is that he was not guilty of larceny in law. The argument upon that point was that inasmuch as the document which he was found guilty of stealing was a copy of another document, and that the copy would in the ordinary course have been discarded, and was taken by him after it had been discarded, he could not be found guilty of stealing it. The definition in s. 1 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), which the learned judge read to the jury, makes it quite plain that the jury were within their rights in coming to the conclusion on the facts of this case, that the appellant had committed the offence of stealing this document. He took it with the intention, as he says, perhaps of destroying it, perhaps of keeping it. There is no doubt that he took it and retained it with the intention of depriving the owner of the document of its possession and, in those circumstances, the direction to the jury being perfectly accurate, the point that he was not guilty of larceny in law cannot be sustained.

In these circumstances, we find that there is no ground upon which the verdict of the jury can be interfered with, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

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Insurance (Fire)—Jewellery concealed in fire-grate—Loss or damage caused by fire in the grate—Fire within proper bounds—Whether loss covered by policy.

The plaintiff took out a "Lloyd's Householder's Comprehensive Policy" of insurance with the defendant and other underwriters, insuring the contents of her flat, including jewellery, against loss or damage caused (inter alia) by fire. For purposes of protection against theft, on leaving her flat one day, she concealed the jewellery in the grate under the coal and wood, which were ready for lighting. On returning in the evening she inadvertently lit the fire and the jewellery was damaged. Upon a claim under the policy the underwriters refused payment on the ground that the policy only covered damage by fire in a place where no fire ought to be:—

Held, that it mattered not whether the property had gone to the fire or the fire had gone to the property. There had been ignition of insured property not intended to be ignited, and the loss fell within the plain words of the policy.

Austin v. *Drew* (1815) 4 Camp. 360, and (1816) 6 Taunt. 436 considered.

ACTION in the commercial list before Atkinson J.

In January, 1939, the plaintiff took out a Lloyd's Householder's Comprehensive Policy with the defendant, who was a member of Lloyd's, and other underwriters. By this policy the contents of her flat at 4, Chartfield Avenue, S.W.1, were insured up to 1500*l.* against loss or damage which might arise from various causes, including fire. On December 2, 1939, the plaintiff was going out for the day and, being uneasy about the safety of a pearl necklace and other jewellery which formed part of the insured property, she wrapped it up and hid it under the coal and wood which was ready for lighting in the grate.

On her return at night, forgetting what she had done, she lit the fire in the grate, and in consequence her jewellery was partly destroyed and partly damaged by fire. The plaintiff claimed to recover the loss, 460*l.*, from the underwriters, and, upon their denying liability, she issued a writ against the defendant claiming a declaration that the defendant was liable under the policy for his proportion of the indemnity.

At the hearing the above facts were not disputed. The underwriters did not deny liability on the ground of negligence on the part of the plaintiff, and the sole question at issue was whether there was a loss by fire within the meaning of the policy, where the damage was done to the insured property in a place where the fire was intended to be.

Montague Berryman for the plaintiff. The indemnity here is against any "loss or damage by fire" to the property insured. The fact that the plaintiff, in ignorance, caused the loss does not affect it. In *Austin* v. *Drew* (1) the loss was caused from over-heating, through a servant not opening the register in an enclosed stove, and there was no ignition. The insurers were there held not liable, but that does not govern the present case. In *Everett* v. *London Assurance* (2) Byles J. said: "The words 'loss or damage occasioned by fire' are to be "construed as ordinary people would construe them. They "mean loss or damage either by ignition of the article con-"sumed, or by ignition of part of the premises where the article "is: in the one case there is a loss, in the other a damage "occasioned by fire."

Samuels K.C. and *Patrick O'Connor* (for *Soskice*, on war service). A fire policy insures against a fortuitous fire only and is distinct from an "all risks" policy, which covers all risks by fire. *Austin* v. *Drew* (1) has never been doubted and is cited in the text-books as unimpeachable authority. The principle laid down by Gibbs C.J. in that case is that where a fire is in a place where fire is intended to be, and the fire has not broken bounds, it is not a fire within the policy. If so, it is not necessary to consider the further question whether the fire caused damage to the insured property. [They referred to MacGillivray on Insurance, 2nd ed., pp. 809–11; Welford and Barry on Insurance, 2nd ed., p. 61, and Bunyon on Insurance, 7th ed., p. 161.] In *Upjohn* v. *Hitchens* (3) Scrutton L.J. said: "It has been held, however, that 'fire' "within the meaning of a fire policy means fire which has "broken bounds, so that damage caused by excess of fire

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(1) (1815) 4 Camp. 360; Holt N. P. 126.

(2) (1865) 19 C. B. (N. S.) 126, 133.

(3) [1918] 2 K. B. 48, 51.

"heat in an ordinary grate is not damage by fire within the "policy."

A domestic fire is not a fire within the policy unless it extends beyond its proper bounds, and the plaintiff is not entitled to recover.

[He cited also *Jameson* v. *Royal Insurance Co.* (1).]

Berryman in reply. *Austin* v. *Drew* (2) only decides that where there is intentional fire and goods lying near are damaged by overheating and not by ignition no claim will arise. No clear view can be gathered from the text-books, but Welford and Barry on Insurance, 3rd ed., at p. 59, and Halsbury's Laws of England, 2nd ed., vol. xviii., Fire Insurance, para. 725, appear to support the plaintiff's view and, so far, form part of the argument in her behalf.

Cur. adv. vult.

1941. Jan. 13. ATKINSON J. read his judgment, which, after stating the facts, was as follows :—

The relevant words in the policy are : "to insure her "'against loss or damage caused by Fire . . . . Burglary, House-"'breaking, Theft or Larceny' and various other causes." The plaintiff says the loss she has suffered comes within that plain and simple language ; goods insured against loss by fire have been unintentionally either totally destroyed or badly damaged by fire and therefore, she says, her claim comes exactly within the language used. The view presented on her behalf is this : that while the burning of something intended to be consumed by fire is, of course, not damage by fire under the policy, the moment you get the accidental burning of something not intended to be consumed by fire there is damage by fire within the meaning of the policy and, therefore, if insured property not intended to be consumed by fire is ignited and thereby damaged or lost ; or if insured property is damaged by heat, smoke, water or demolition caused by the burning of property not intended to be consumed by fire, there is loss or damage by fire within the meaning of the policy. The underwriters very properly want it to be made quite clear that they are not disputing liability on the ground of negligence, or that the loss was due to an act of forgetfulness on the part of the plaintiff, or was the inevitable result of her own act. In their view the position is just the same as if a maid instructed by the plaintiff not to light the fire had forgotten or misunderstood her instructions and lighted it and so caused the loss. They agree that there has been accidental loss which would be covered by an All Risks policy ; but they dispute that this loss is a loss by fire within the meaning of this policy. The principle which they seek through the defendant to establish is this—that where damage is done to insured property by fire in a place where fire is intended to be—where fire has not broken bounds—the loss is not covered, because such a fire is not a fire within the meaning of the policy. The argument is that there must be a fortuitous fire somewhere where fire ought not to be, and that it is only damage caused by such an accidental fire that comes within the policy, and that the actual burning of the insured property does not in itself constitute loss or damage by fire within the meaning of the policy. The idea presented is that there must be an unintentional coming of fire from its proper place to the insured property, and that the policy is not concerned with the coming and burning of insured property to and by a fire which is behaving itself with perfect propriety in a place where it is intended to be.

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(1) (1873) Ir. Rep. 7 C. L. 126.

(2) 4 Camp. 360 ; 6 Taunt. 436.

Mr. Samuels urges that the first question I ought to ask myself is : was there a fire within the meaning of the policy ? and that if, and only if, I find that there was, does the question arise, did such fire cause damage to insured property ? He contends that it is impossible to hold that the fire intentionally lighted and burning quite properly in the grate was a fire within the meaning of the policy. According to this view the short and simple words in the policy against "loss or damage "caused by fire" mean loss or damage caused to insured property by a fortuitous catching fire of something not intended to be consumed by fire in a place where fire is not intended to be. The whole difference between the parties lies in those last few words. Unless there is spontaneous combustion, and

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apart from fires caused by electricity or lightning, the unintentional burning of insured property must, I suppose, always be caused directly or indirectly by fire created intentionally of matter intended to be consumed, as, for example, domestic fires, lighted candles, oil lamps, gas jets, matches, tapers, cigarettes. Of course, one does not insure against the happening of such intended fires. One insures against the risk of insured property getting burned by unintentional contact with some such fire or with fire started by some such fire. A householder has of necessity to make use of fire in his house for heating and lighting. He knows that fire is a source of danger, not merely from the escape of fire from its legitimate place, but also from things coming in contact with it in its legitimate place in any of the forms I have just enumerated.

I have no doubt that the ordinary man when he insures against loss by fire believes that he is insuring against every kind of loss which he may suffer from the more or less compulsory use of fire by himself or his neighbour. If he were told that the words in a Lloyd's policy meant only loss from contact with fire where no fire ought to be, many questions would spring to his mind—as they spring to mine. Am I not covered, he would ask, if the wind blows something—say a valuable manuscript or a sheet of foreign stamps—into the fire in the grate? Or if a careless servant drops something into the fire—or if my wife stumbles and causes her lace scarf or silver fox tie to get caught by a flame in the fire grate? To all these questions Mr. Samuels answers No. But what if part of the scarf is consumed in the grate, and the rest of it outside the grate on the hearth-rug? Do I get compensation for the part burnt outside the grate, though not for the part burnt in the grate? And what if the burning scarf burns a hole in the carpet? That is not the fault of the fire in the grate; that fire has not broken bounds. Am I covered for that? Again, what is the position if the lace catches fire by coming in contact with a lighted candle on the dinner table? The flame of the candle is in the exact place where it is intended to be. Is it on a par with the fire in the grate?

What if the wind blows a curtain against a lighted gas jet and the curtain catches fire? I imagine that the ordinary man would say: "Your policy is no use to me. I should "never know where I was. I want an underwriter who knows "what he means and says what he means." There certainly ought to be some clear understanding as to the meaning of these apparently simple words so that persons insuring may know where they stand, and—if the defendant is right—not continue in a fool's paradise, believing that they have a protection which, in fact, they have not. There are one or two well settled rules of construction with regard to policies. One is that the construction depends not upon the presumed intention of the parties but upon the meaning of the words used. In *Nelson Line* (*Liverpool*) v. *James Nelson & Sons* (*No.* 2) (1) Lord Loreburn L.C. said: "I know of only one standard "of construction, except where words have acquired a special "conventional meaning, namely, what do the words mean on "a fair reading, having regard to the whole document?"

There is another rule which I find summarized in *Hamlyn & Co.* v. *Wood & Co.* (2) from Lord Esher's judgment: "I have for "a long time understood that rule to be that the Court has no "right to imply in a written contract any such stipulation, "unless, on considering the terms of the contract in a reasonable "and business manner, an implication necessarily arises that "the parties must have intended that the suggested stipulation "should exist. It is not enough to say that it would be a "reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." Another rule of construction is that as a policy is prepared by the underwriters any ambiguity therein must be taken most strongly against the underwriters by whom it has been prepared. If a policy is reasonably susceptible of two constructions, that one will be adopted which is more favourable to the insured.

Again, in *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (3), Brett L.J. said this: "An English policy is to be construed according to

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(1) [1908] A. C. 16, 20.

(2) [1891] 2 Q. B. 488, 491.

(3) (1880) 6 Q. B. D. 51, 58.

"the same rules of construction, which are applied by English "Courts to the construction of every other mercantile instrument. "Each term in the policy, and each phrase in the policy, is "prima facie to be construed according to its ordinary "meaning." Guided by these principles I can see no reason whatever for limiting the indemnity given by the policy in the way claimed by the defendant. In my judgment the risks against which the plaintiff is insured include the risk of insured property coming unintentionally in contact with fire and being thereby destroyed or damaged, and it matters not whether that fire comes to the insured property or the insured property comes to the fire. The words of the policy are just as descriptive of one as the other, and I cannot read into the contract a limitation which is not there. To enable me to accept the contention of the underwriters I should have to read something into the contract—some such words as "unless the "insured property is burned by coming in contact with fire "in a place where fire is intended to be."

What justification can there be for so doing? To what absurdities would it lead? A red hot cinder jumps from the fire and sets some paper of value on fire—admittedly there is liability. A draught from the window blows the same paper into the same fire. Is that any less an accidental loss by fire? Are the words in the policy any less applicable to the latter than the former? A draught blows the flame of a candle against a curtain—admittedly there is liability. But what if the curtain is blown against the flame of the candle? Surely the result must be the same? If it is not the same the result is an absurdity. If it is the same, why should the result be different if one substitutes a fire in a grate for the lighted candle in a candle-stick? Unless I am bound by authority to the contrary, or unless I can find a consensus of opinion to the contrary among text-book writers indicating a generally accepted interpretation of these words, I must give effect to the view I have formed. Mr. Samuels relies—and it is his only prop—upon the case of *Austin* v. *Drew* (1)—not, indeed, upon the actual decision, that gives him no help—but upon two sentences to be found in one of the four reports of the case in the summing up to the jury by Gibbs C.J. [His Lordship read the statement of facts in that case, and continued:] The head-note is this: "From the negligence of a servant of "the assured in not opening a register, smoke and heat from a "stove used in the manufactory are forced into a room and "greatly damage goods, without actually burning any, the "fire not being greater than it ought to have been had there "been free vent for the smoke and heat. This held not to be a "loss within the policy." Judging from the head-note the grounds of the decision were the negligence of the plaintiff's servant and the absence of any burning of any of the insured property. Nowadays it is well established that negligence is immaterial, and in the case with which I have to deal there was burning of the insured property. But in the direction to the jury Gibbs C.J. said this: "If there is a fire, it is no answer "that it was occasioned by the negligence or misconduct of "servants; but in this case there was no fire except in the "stove and the flue, as there ought to have been, and the loss "was occasioned by the confinement of heat. Had the fire "been brought out of the flue, and anything had been burnt, "the company would have been liable. But can this be said, "where the fire never was at all excessive, and was always "confined within its proper limits? This is not a fire within the meaning of the policy."

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(1) 4 Camp. 360.

There are several sources of damage from fire; there are the flames, the heat generated, the smoke and sparks produced. Some might find it difficult to see how it could be said, when in fact smoke, sparks and excessive heat were forced into the room, that the fire was always confined within its proper limits. It could only be true of the actual flames.

I asked Mr. Samuels what would be the position if the excessive heat had caused some of the bags to ignite, and the answer was that the loss would be within the policy—and yet it would have been just as true to say the fire had not been brought out of the flue.

The next report of this case to which I will refer is in Holt's

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Reports (1). There one can find little, if any, reference to this point about fire escaping from its proper place. According to that report the Chief Justice directed the jury: "As no "substance, therefore, was taken possession of by the fire, "which was not intended to be fuel for it; as the sparks "and smoke caused no mischief, but as the damage "arose from an excess of heat in the rooms, occasioned "by the register being shut, I am of opinion that the "plaintiffs are not entitled to recover." The main point, the point in the forefront, is surely this, that no substance was taken possession of by the fire which was not intended to be fuel for it. The editor's note about that case is as follows: "It is not to be concluded from this case that an "insurer on a policy against fire is exempt from a loss "occasioned thereby, on the ground that the servants of the "assured have been careless or unskilful, and that the fire was "occasioned by their negligence and misconduct. An insurer "would unquestionably be answerable in such a case. The "spirit of the decision of the present case is this: that there "was no loss by fire, by whatever cause or misconduct produced. "The injury arose from the misdirection of heat, occasioned by "the unskilful management of the machinery in the sugar "house. It was not, therefore, in any fair and reasonable "construction of the policy, one of those accidents against "which the defendant had engaged to indemnify the "plaintiffs." The test of liability according to that report and according to that note is this: has something been consumed by fire which was not intended to be consumed? There was a motion for a new trial in the Court of Common Pleas (2). It is interesting to read the argument and see how it was dealt with. The Solicitor-General said: "If actual flame was the cause of the damage, it "matters not whether the fire was properly or improperly "lighted, but the question is whether fire occasioned the "damage. If any other criterion be taken, it would in many "cases of policies against fire introduce nice and intricate "questions. It cannot be necessary that the fire, to produce a

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(1) Holt. N. P. 126, 128.

(2) (1816) 6 Taunt. 436, 438.

"loss within the policy, should be only such fire as is communicated to some substance not contained in the intended "and proper receptacle of fire." Then he goes on to give other illustrations. He treats as unarguable the very proposition for which Mr. Samuels contends. Gibbs C.J. is reported to have said: "I think it is not necessary to determine any "of those extreme questions. In the present case, I think no "loss was sustained by any of the risks in the policy. The "loss was occasioned by the extreme mismanagement by the "plaintiffs of their register. I so directed the jury, and "I have no reason to alter the opinion I then formed." Dallas J. said: "I am of the same opinion. The only cause "of the damage appears to me to have been the unskilful "management of the machinery by the plaintiffs' own "servants, and it is therefore not a loss within the meaning "of the policy." The rule was refused apparently on the ground of negligence; but be that as it may it is very difficult to argue that this case is an authority for the construction put upon it by Mr. Samuels when it is said by Gibbs C.J. in terms "I think it is not necessary to determine any of those extreme "questions"—one of them being this very question whether it is or is not necessary that the fire should have taken place in some place other than the place where the fire was intended to be.

There was a fourth report of the case in Marshall's Reports (1). Gibbs C.J. is reported in the same language as that which I have just read, and Dallas J. said: "His Lordship's "direction appears to me to have been perfectly right, and "the jury have drawn a perfectly correct conclusion from it. "There was nothing on fire which ought not to have been on "fire; and the loss was occasioned by the carelessness of the "plaintiffs themselves." Park J. concurred. "There was "nothing on fire which ought not to have been on fire." These words suggest that the basis of liability is ignition of something not intended to be ignited. In that case there was no ignition of anything but the fuel and, therefore, there was no liability, and no fire within the policy.

(1) 2 Marshall, 130, 132.

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In this case there was ignition of something which ought not to have been ignited, bank notes, cotton, leather, jewellery, and so on.

The next case to which I was referred is *Everett* v. *London Assurance* (1). It was a claim on a policy of insurance against fire. There had been an explosion about a quarter-of-a-mile away which had damaged the plaintiff's premises, the windows had been blown in and there was also other damage, and a claim was made that this was damage caused by fire within the meaning of the policy. The argument as to the effect of *Austin* v. *Drew* (2) is not without interest. It took the form of a quotation from Marshall on Insurance. This was the quotation: "In Marshall on "Insurance, vol. 2, book iv. (a), page 790 (edition 1823), it "is said that 'by the terms of the usual policy, the insurers "'undertake to pay, make good, and satisfy to the insured "'all loss or damage which may happen by fire during the "'term specified in the policy', and so on. In order, therefore, "to bring the loss within the risk insured against, it must "appear to have been occasioned by actual ignition; and no "damage occasioned by mere heat, however intense, will be "within the policy." It ended up with the words, that the sugar was damaged "not by the smoke but by the excessive "heat; but nothing took fire." Those last words "nothing "took fire" are in italics, showing that they were regarded as containing the gist of the decision. In that case Byles J. said: "The expression in the policy which we have to "construe is, 'loss or damage occasioned by fire'". That is exactly the expression that I have to construe in this case, except that I have the word 'caused' instead of 'occasioned'. "Those words are to be construed as ordinary people would "construe them. They mean loss or damage either by ignition "of the article consumed, or by ignition of part of the premises "where the article is: in the one case there is a loss, in the "other a damage, occasioned by fire. Lord Bacon says: "'It were infinite for the law to judge the causes of causes, "'and their impulsions one of another; therefore it contenteth

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(1) 19 C. B. (N. S.) 126.

(2) 6 Taunt. 436; 2 Marshall, 130.

"'itself with the immediate cause, and judgeth of acts by "'that, without looking to any further degree'." It is a little too wide, because it is clear that there need not be ignition of part of the premises where the article is. If the loss is occasioned by the ignition of premises in the near neighbourhood, the result is the same.

There is one other case to which I was referred: *Upjohn* v. *Hitchens* (1). During the argument Scrutton L.J. observed: "It has been held, however, that 'fire' within "the meaning of a fire policy means fire which has broken "bounds, so that damage caused by excess of fire heat "in an ordinary grate is not damage by fire within the "policy". I do not think that I can attach very much weight to an intervention of that kind with no argument about it; but there is something a little more relevant in the judgment of Pickford L.J.: "Nor am I impressed by the other case "put where it has been held that the ordinary policy against "fire does not cover damage caused by overheating from a "fire in an ordinary grate. There the damage was held not "to be damage by fire, but damage by heating, damage "caused by an ordinary domestic fire not being covered unless "it sets fire to the house." He must have used the word "house" merely because he was dealing with a case of a house having been set on fire. Substituting the words "insured property" again I find the same test as that laid down by Dallas J. in a similar case. The weight of authority seems to me to be strongly in favour of the test contended for by Mr. Berryman. I think that there is loss or damage caused by fire when there has been ignition of insured property which was not intended to be ignited, or when insured property has been damaged otherwise than by ignition as a direct consequence of the ignition of other property not intended to be ignited. In other words, I base my view in substance on what Byles J. said in *Everett* v. *The London Assurance* (2).

I was referred to text-books; one a very old one, Marshall on Insurance, from which I read a quotation in *Everett's* case (2).

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(1) [1918] 2 K. B. 48, 51, 53.

(2) 19 C. B. (N. S.) 126.

The next was Bunyon on Insurance. There is no suggestion in Bunyon's book of fire being restricted to places where fire is not intended to be. There is a paragraph on page 161 of the 7th edition describing his view of the risk insured against: "The 'risk' must now be construed "as applicable not only to loss by fire, but also to loss by "the agency of the other perils insured against. In the case "of loss by fire, there must, of course, be actual ignition, "not necessarily of the property itself, but of some substance "near to it." He refers to *Austin* v. *Drew* (1), and he goes on (p. 162): "It is not, of course, necessary that the property "must be itself on fire, since losses by smoke and water, when "the fire has not touched the objects injured, are familiar to "all managers of insurance offices. All that appears to be "now necessary is, that something should have caught fire, and "damage have been thereby occasioned to the insured "property." The next was Mr. Macgillivray's "Law of Insurance." That was the one text-book in which Mr. Samuels could find support for his contention. In the 2nd edition, p. 809, the author says: "Fire within "the meaning of a fire policy means fire which has broken "bounds. There must be actual ignition where no ignition "ought to be. Damage caused by excess of fire-heat in its "proper place, or by smoke from a fire in its proper place, is "not damage by fire. Thus, where articles are destroyed in "process of manufacture by the excessive application of heat, "whether by negligence or pure misadventure, the damage "cannot be recovered as damage by fire, unless they have "actually ignited." There is perhaps some suggestion there on the lines of Mr. Samuels' argument; but in my view the one authority on which that passage is based, proves, when carefully examined, to be in truth no authority for it at all. Then as a matter of interest I was referred to Welford and Otter Barry on Fire Insurance, 2nd edition, p. 61: "Any loss, "therefore, occasioned by such a fire, whether by the burning "of any property in the fire itself, or by the scorching or "cracking of any property adjacent to it owing to its intense

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(1) 4 Camp. 360.

"heat, if unaccompanied by ignition, is not covered by the "contract, since the cause of the loss cannot be regarded as a "peril insured against." That line in particular "whether "by the burning of any property in the fire itself" was strongly relied upon by Mr. Samuels. But the answer was to refer to the 3rd edition of the same book at pp. 59–60.

Before I refer to what is there said I want to refer to the Preface to the 3rd edition: "Many questions in fire "insurance are not covered by direct authority, and may still "be regarded as open. In discussing such questions, an "attempt has been made to answer them." Then: "Another "example, which is discussed for the first time in this edition, "is the question whether an article which accidentally falls "into a domestic fire and is burned there is destroyed by fire "within the meaning of a fire policy." That is a statement by the author that whatever may have been said in the 2nd edition was not the result of a discussion or consideration of this particular question, and (p. 59): "So long as the fire is "burning in the grate or furnace, it is fulfilling the purpose "for which it was lighted. If, therefore, property adjacent to "the fire is merely damaged by scorching or cracking, owing "to its proximity to the fire, the loss is not covered; though "the element of accident may be present, there is no ignition "of the property, and nothing is on fire which ought not to "be on fire. If, however, the fire breaks its bounds and, by "throwing out sparks or otherwise, causes ignition to take "place outside the grate or furnace, there is at once a loss by "fire within the meaning of the contract. The question then "arises what is the position where property is accidentally "burned in an ordinary fire, such as a domestic fire: the fire "never breaks its bounds, but something which was never "intended to be burned falls or is thrown by accident into the "grate and is burned. In this case, equally with the case "where the fire breaks its bounds, there is an accident and "something is burned which ought not to have been burned. "The only distinction between them is that in the one case it "is the fire which escapes out of its proper place and "comes into contact with the property destroyed whereas

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"in the other case it is the property which gets out of its "proper place and comes into contact with the fire. This "distinction does not appear to be sufficient to make any "difference in the result. The object of the contract is to "indemnify the assured against accidental loss by fire, and so "long as the property is accidentally burnt, the precise nature "of the accident seems to be immaterial. It may be therefore "concluded that the loss in both cases falls equally within the "contract." I was also referred to Halsbury's Laws of England, 2nd ed., vol. xviii., para. 725, but I can find no suggestion there that the place of the fire is a relevant consideration.

In the text-books there is no clear consensus as to the meaning of these words which might force me to hold that they have acquired a recognized meaning to which one can give effect. The most Mr. Samuels can get out of the text-books is a difference of opinion or ambiguity. But ambiguity is fatal to his case. The interpretation most favourable to the insured must be adopted.

In my judgment the plaintiff is entitled to succeed. I give judgment for the plaintiff for the agreed amount, 460*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Cameron, Kemm & Co.*
Solicitor for defendant: *William C. Crockett.*

F. P. F.

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Landlord and tenant—Rent restriction—Death of statutory tenant—Decontrol—Landlord coming into possession—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.*1, 3.

On the death of the statutory tenant her step-daughter, the defendant, then living with her, stayed on, and some days later entered into an agreement of tenancy of the house at a rent higher than the statutory rent. Subsequently she claimed that the house had never become decontrolled, contending that the landlord had not come into possession on the death of the statutory tenant within the meaning of s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and refused to pay the agreed rent. In an action by the plaintiff, the present landlord, to recover arrears he contended that after the death of the statutory tenant the defendant became the licensee of the then landlord and that he had come into possession through her: but at the trial he admitted that his predecessor in title had at no time "possession, actual or notional":—

Held, therefore, that the landlord had not come into possession.

Semble, that apart from this admission, the landlord had not, in the above circumstances, come into possession, which by s. 2, sub-s. 3 of the Act of 1923, means "actual possession," the subsection enacting further that "a landlord shall not be deemed "to have come into possession by reason only of a change of "tenancy made with his consent."

APPEAL from Kingston-upon-Thames County Court.

The plaintiff, the respondent, claimed for arrears of rent of a house, 79, Russell Road, Wimbledon. The house was originally let to a married man who had resided there with his wife and three children. He died on February 26, 1926, and his widow succeeded him as statutory tenant by reason of the provisions of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1). The widow died on January 22, 1929, all the rent being paid up

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (*g*): ". . . . the expres- "sion 'tenant' includes the widow "of a tenant [dying intestate] "who was residing with him at "the time of his death."

By s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935 (25 Geo. 5, c. 13), the words "dying intestate" are to be omitted.

Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 2, sub-s. 1: "Where the landlord of a "dwelling-house to which the "principal Act applies is in "possession of the whole of the to her death. The defendant, a step-daughter of the widow, was then living in the house, and on the widow's death the landlord, successor in title to the original landlord, entered into negotiations with her, and she eventually became tenant of the whole house at 1*l*. per week. No furniture was at any time removed. It was found as a fact by the judge, and admitted by counsel for the plaintiff, that that landlord had "at no time possession, actual or notional." After a time the defendant alleged that she was a statutory tenant and only liable for the statutory rent which was less than 1*l*. per week. The plaintiff then started these proceedings in the county court claiming arrears of rent. The county court judge gave judgment for the amount claimed.

The defendant appealed. The appeal was heard on January 16, 17, 1941.

Bernstein for the appellant. The house did not become decontrolled. Up to the death of the widow it was a house to which the Rent Restrictions Acts applied. Subsequently the step-daughter, the defendant, became tenant, and the question is whether in the interval between the death and the defendant's tenancy the landlord came into possession within the meaning of s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923 (1). The onus of showing this is on the landlord: see s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. All that happened was that there was a change of tenancy which by s. 2, sub-s. 3, of the Rent and Mortgage Interest (Restrictions) Act, 1923 (1), did not involve the coming into possession of the

" dwelling-house at the passing of " this Act, or comes into possession of the whole of the dwelling-" house at any time after the " passing of this Act, then from " and after the passing of this " Act, or from and after the date " when the landlord subsequently " comes into possession, as the " case may be, the principal Act " shall cease to apply to the " dwelling-house."

Sub-sect. 3: " For the purposes " of this section, the expression " ' possession ' shall be construed " as meaning ' actual possession,' " and a landlord shall not be " deemed to have come into " possession by reason only of a " change of tenancy made with " his consent."

(1) See note (1), ante p. 477.

landlord. Possession by that section means "actual "possession." So far from discharging the onus of showing that the landlord came into possession, the plaintiff admitted that his predecessor never had possession, "actual or notional," and the judge so found as a fact. That is conclusive of this case.

Humfrey Edmunds for the respondent. The landlord took possession before the new tenancy was created. There must always be at least a notional interval of time between the death of the tenant and the taking of possession by the landlord. During that interval the defendant was not a tenant, for the new tenancy had not been created, and none could be transmitted to her from the widow (*John Lovibond & Sons* v. *Vincent* (1)), nor was she a trespasser, because her original entry was lawful. Therefore she was a licensee of the landlord, and the landlord was in actual possession by her (*Goudge* v. *Broughton* (2), and *Kearns* v. *Bedford* (3)). There was not here a change of tenancy with the landlord's consent within the meaning of s. 2, sub-s. 3, of the Act of 1923 (4), but the creation of an entirely new tenancy (*Pain* v. *Cobb* (5)). At the widow's death the landlord clearly had the right to take possession and the fact that he did not go through the ritual of doing so physically can make no difference, nor the fact that he failed to turn the defendant out for a few days. But he could have done so. The plaintiff's admission that he never took possession means only that he never took physical possession in person.

[DU PARCQ L.J. It may mean any form of taking possession, and why should we put the interpretation upon it most favourable to the plaintiff?]

SCOTT L.J. This is a claim by a landlord for arrears of rent, the decision of which turns entirely upon the construction of the Rent Restrictions Acts. When the case was tried in the county court the judge heard very little evidence, if any, and

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(1) [1929] 1 K. B. 687.

(2) [1929] 1 K. B. 103.

(3) (1934) 50 Times L. R. 348.

(4) See note (1), ante p. 477.

(5) (1931) 146 L. T. 12.

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the case was tried by him upon admissions made by counsel. He reserved his judgment in which he clearly states his findings of fact and the admissions which were made.

The question is not an easy one, but in my view we can and ought to dispose of this case upon the judgment as given, without sending it back to the county court judge to ascertain the facts further. The question, quite shortly, is this. The house in question, 79, Russell Road, Wimbledon, had been let originally to a married man, who had resided there with his wife and three children. He died on February 26, 1926, and his widow succeeded him as statutory tenant by reason of the provisions of s. 12, sub-s. 1 (*g*), of the Act of 1920, which defines "landlord" and then provides as follows: "The "expression 'tenant' includes the widow of a tenant who was "residing with him at the time of his death, or, where a tenant "leaves no widow or is a woman, such member of the tenant's "family so residing as aforesaid as may be decided in default "of agreement by the county court." Originally the right of a widow was limited to the case of a tenant dying intestate, but those words were repealed by s. 1 of the Act of 1935. The provision about residence is subsequently subjected to a condition that the residence should have lasted for six months—see s. 13 of the Act of 1933.

The first point in the case turns upon the question of what happens after the death of a widow of a statutory tenant within the meaning of that section. The widow in question died on January 22, 1929. All the rent was paid up to the time of her death. A step-daughter of the widow, a married daughter of the late tenant, then living in the house, and who is the defendant in the present proceedings, in fact succeeded to the tenancy of her step-mother. The county court judge finds the facts in these terms: "Upon the death [of the widow] "the then landlord entered into negotiations with the defend-"ant, with a view to her becoming tenant of the premises. "She did become tenant at 1*l.* per week. No furniture was "at any time removed. The defendant, as it was put, took "over the house 'lock, stock and barrel.' The landlord had "at no time possession, actual or notional."

That is practically all the information which the county court judge gives to the Court in his judgment as to the facts relating to the defendant becoming tenant, except that she paid 1*l*. per week for some time, but later was advised that she was a statutory tenant within the meaning of the Acts, and therefore not bound to pay more rent than had been paid by her stepmother down to her death, which was something less than 1*l*. per week. After a time the landlord started an action in the county court claiming arrears of rent, a comparatively small amount, for a certain period of time. The question the judge had to decide was whether the defendant was entitled to the benefit of the statutory limitation on the amount of rent, or whether she was obliged to pay the 1*l*. per week she had agreed to pay.

The county court judge recites the submissions on behalf of the defendant, and then gives a finding upon them. In his own words: "It was submitted on behalf of the defendant "(i.) That the burden of proving that the house was not a "dwelling-house to which the principal Acts applied rested "on the plaintiff: see s. 7, sub-s. 1, of the Act of 1938. That is "correct and was conceded."

"(ii.) That the predecessor in title of the plaintiff had never "come into possession of the whole of the dwelling-house "within s. 2, sub-s. 1, of the Act of 1923. That is correct and "was conceded." That section was subsequently repealed, but it was left to apply as at the date when it had application before the date of the repeal. Therefore the question before the county court judge was whether or not the landlord had come into possession of the dwelling-house within the meaning of that section. "(iii.) That all that had happened was a "change of tenancy made with the landlord's consent." That view may be right or it may be wrong, but, as the learned judge said, it is not really relevant to the decision of the case, because of the admission that the predecessor in title of the plaintiff had never come into possession of the whole of the dwelling-house. "(iv.) That the registration of the house "under s. 2, sub-s. 2, of the Act of 1933 was of no effect. That "was conceded on the part of the plaintiff." The house had been registered under that Act as decontrolled. "(v.) That "the recoverable rent was that paid by the [widow of the "tenant]." The phrase "recoverable rent" is defined in s. 16, sub-s. 1, of the Act of 1933 as meaning "in relation to any "dwelling-house, the maximum rent which, under the pro-"visions of the principal Acts, is or was recoverable from the "tenant." The learned judge continues: "That depends "upon the decision of the point above referred to." I am not quite sure which of the preceding paragraphs he refers to there, but I think he means that the recoverable rent depends upon whether the house was controlled or decontrolled. He continues: "Of course, the dwelling-house is now controlled by "later legislation, but it is agreed that, if the decision is against "the defendant under the fifth submission, the recoverable "rent is 1*l*. per week, and no question will arise as to figures." Using the word "recoverable" not in its statutory sense but in its ordinary sense in the English language, the plaintiff was entitled to recover the full rent which the defendant had agreed to pay unless the house in her possession was a controlled house of which she was the tenant.

The judge continues as follows: "The contention of "the plaintiff is that on the death of [the widow] the statutory "tenancy was finished, and that her right under s. 12, sub-s. 1 "(*g*) [of the Act of 1920], having come to an end, the principal "Act ceased to apply to the premises. That, upon the agreed "facts, the onus of proving that the premises had become "decontrolled was discharged." Then he refers to the registration with which I need not deal, and ends his judgment as follows: "I am of opinion that these contentions are correct. "There will accordingly be judgment for the amount claimed "with costs."

It was submitted by counsel for the defendant that the county court judge had gone wrong in law by disregarding the principle, which he professed to accept, that it is for the plaintiff to prove that the house has been decontrolled, pursuant to the provisions of s. 7, sub-s. 1, of the Act of 1938, which provides: "If any question arises in any proceedings "whether the principal Acts apply to a dwelling-house,

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"it shall be deemed to be a dwelling-house to which "those Acts apply unless the contrary is shown." Under s. 2 of the Act of 1923 it was necessary, on the facts of this case, for proof to be given that, on the death of the widow, the landlord had obtained actual possession. It being conceded as the county court judge found, that the landlord never had possession, either actual or notional, prima facie the plaintiff was out of court, and, in my opinion, he ought to have given effect logically to the submission on behalf of the defendant that the predecessor in title of the plaintiff had never come into possession at all. He finds that that is correct, and that it was not disputed by the landlord. That is enough to make it necessary to allow this appeal. We have had an interesting argument on what constitutes actual possession by the landlord when a statutory tenant dies, but it is not necessary to go into that question for the decision of this case, and I do not propose to do so. The appeal must be allowed with costs.

MACKINNON L.J. I agree. There is no dispute that this house was what may be called a controlled house up to the end of 1928. It would continue in that category unless it were proved that it had been taken out of it. The burden of proving that it had been taken out of it was cast upon the plaintiff, the landlord, under s. 7, sub-s. 1, of the Act of 1938. The landlord not only did not prove that it had been taken out of that category because he had come into possession of the premises, but he admitted that his predecessor in title "had "never come into possession of the whole of the dwelling-"house within s. 2, sub-s. 1, of the Act of 1923." That being so, the obvious result is that the plaintiff failed to adduce any evidence and discharge the onus of showing that the house had become decontrolled and remained a decontrolled house. Therefore he was charging too much rent, and the claim to refund it must be successful. That seems to me to be the whole of the case. I therefore think that the county court judge was wrong when he decided that the house was decontrolled. I agree that the appeal succeeds.

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du Parcq L.J. I agree, and I wish to add a few words with reference to the very ingenious argument put before us by counsel for the respondent. First of all I should like to say this—and from some observations which have been made by Scott L.J. and MacKinnon L.J. in the course of the case, I think that they agree with me—that this is a most unfortunate way to try proceedings of this kind. In the great majority of cases of this sort, it is most desirable that evidence should be heard. It is not satisfactory in a county court, where facts have to be found, that statements and admissions should be made and the case heard as if on a case stated. I do not know that the result would have been any different in this case if another course had been adopted, but at the same time I have no doubt that it is usually desirable to hear evidence upon which to base findings of fact, and that it is not desirable to base them upon the opening statement of counsel, even if the other side agrees with it.

I agree that in the circumstances it is quite impossible to take any course but to allow this appeal. The landlord undoubtedly had the burden, in the circumstances of the case, of proving that the premises had been decontrolled. In order to do that, it was necessary for him to show that he was in possession of the dwelling-house, or had come into possession of it. To make an admission that he never came into possession of the dwelling-house was a very strange way of proving that he had.

Counsel for the respondent says, however, that, if one looks at the whole of the agreed facts, it will be apparent that the landlord's predecessor in title came into possession of the premises without knowing it, and, although he did not realize it, was really in actual possession. Counsel reached that conclusion by first of all relying on *Goudge* v. *Broughton* (1). Having looked more closely at that case I should like to say a word or two about it. It is used by counsel for the respondent to support this argument: "When "a statutory tenant dies, before a new tenancy can begin, "there must be a lapse of time. It may be a fraction of a "second, it may be some hours, or it may be some days, but

(1) [1929] 1 K. B. 103.

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"there must be a lapse of time. Though somebody else may "become tenant, and though there may be no moment of "time in respect of which the landlord does not receive rent, "either from the deceased tenant or from the representatives "of the deceased tenant or from the new tenant, still, "notionally there is a period after the death of the old tenant "when the new tenant has not yet come into possession as a "tenant, and during that period the landlord comes into "possession." That may be right as far as notional possession goes. Counsel goes on to say, however, that *Goudge* v. *Broughton* (1) is an authority for the proposition that during such a period the landlord is in actual possession. I venture to think that when that case is looked at, it is not an authority for anything of the kind. The facts were these. The plaintiff bought a cottage in 1925. It had never been let. The new purchaser, of course, was in possession of that cottage, unless it could be said that somebody else was in possession of it so as to exclude him. If a man buys an empty house, though he never goes inside it, he is in actual possession of it. Nobody else can be. If there is a tramp sleeping in it without his permission, the new owner is still in possession of it. If there is somebody there whom he allows to be there, not as a tenant, but merely as a licensee, still it may be said that there are facts on which it can reasonably be found that the new owner is in possession of it. The difficulty of the plaintiff in *Goudge* v. *Broughton* (1) was not so much on that point as on quite a different point, as to which the Divisional Court was bound to decide against him because of a previous decision. It had been said: "It is quite true that you "were the owner, and it may be true, and probably "is true, that you were in possession, but you were not the "landlord, because nobody can be the landlord of a house "which has not been let, and it has not been let by you." That argument had appealed to the Divisional Court in *Cohen* v. *Gold* (2), and the Divisional Court in *Goudge* v. *Broughton* (1) was bound to follow *Cohen* v. *Gold* (2). The Court of Appeal when the former case came before it, said that *Cohen* v. *Gold* (2)

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(1) [1929] 1 K. B. 103.

(2) [1927] 1 K. B. 865.

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was wrongly decided, and Scrutton L.J. said (1): "Holding "this," [that if the plaintiff did obtain possession it was when the cottage had never been let and therefore he could not be a landlord] "the Court did not decide the point about the "gardener, though I think the judgment of Salter J. shows "he would either have held Goudge to have possession through "the gardener, or the finding of the county court judge to be "one of fact with which he could not interfere. I take the "same view of this point. I think there was evidence on "which the judge could find that the owner was in actual "possession through the tenant at will or licensee." All that Scrutton L.J. decided, therefore (and Greer L.J. and Sankey L.J. agreed) was that, where a man who must be held to be the landlord had been in possession of a house, and there was nothing to show that he was not in possession except that he allowed a gardener to live in it, as a tenant at will, then, through the gardener, or licensee, he could be said to have not only possession, but actual possession. That seems to me to be a very long way from saying that, where for some very short period after the death of the tenant the new tenant has not already entered upon her tenancy, but is negotiating, perhaps for a few minutes on the doorstep with the rent collector, not only must she be taken to be a licensee (which may be right), but that during that period the landlord must be regarded as having actual possession. I venture to doubt whether Scrutton L.J. would have thought that, if there had been a finding to that effect by the county court judge, it could be supported by evidence as a finding of fact.

The other case upon which counsel for the respondent relied was *Kearns* v. *Bedford* (2). He relied on that for the purpose of showing that, there being, as he says, a hiatus between the tenancies, it is not really material to see that the rent was paid continuously and that the whole period was covered by payment of rent.

It is unnecessary to say whether there has been a change of tenancy with the landlord's consent, though I should think it is probably right to say that there was. It is unnecessary to

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(1) [1929] 1 K. B. 130.

(2) 50 Times L. R. 348.

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decide it because I think it is plain that the landlord, in such circumstances, has not come into actual possession. It is only necessary to say that *Kearns* v. *Bedford* (1) was a case in which, by general consent, the landlord had come into actual possession. He had been in actual possession for some days, but it was argued (and it was a bold argument) that, inasmuch as the new tenancy agreement was antedated, therefore the new tenant must be deemed to have been in possession when in fact he was not, and that the landlord must be deemed to be out of possession when in fact he was in possession. That argument was rightly rejected by the Court, because possession is a question of fact. If one is once in actual possession, nothing can happen to show that one has not been in actual possession.

I thought it desirable to make these observations on these cases, because, if we passed over in silence the argument of counsel for the respondent, it might be supposed that this Court had approved of the interpretation which he sought to put on it. I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Barnett Janner.*
Solicitors for respondent: *Bristows, Cooke & Carpmael.*

W. L. L. B.

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(1) 50 Times L. R. 348.

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Jan. 24.
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April 30.

SLATER *v.* WORTHINGTON'S CASH STORES (1930), LIMITED.

Nuisance—Snow on roof—Fall on pavement—Injury to plaintiff—Liability of occupier—Negligence—Landlord and tenant—Lease of premises—Covenant by landlord to keep walls, roofs and other outside parts of premises in repair.

The plaintiff, while on the pavement looking through the window of the defendants' shop premises, was injured by a fall from the roof of the premises of snow which had accumulated there through unusually severe storms. The roof and the guttering were for all ordinary purposes in perfect condition. It would have been possible to remove the snow from the roof at any time within four days before the accident, but the defendants took no step to remove it, nor did they give any warning to persons using the pavement of possible danger from the snow nor prevent by any means the public from walking or standing under the roof. The premises were occupied by the defendants under a lease containing a covenant by the landlord to keep " the walls " and roofs and all other outside parts of the premises . . . . " in good repair and condition."

Held, (1.) that the accumulation of snow amounted to a public nuisance, and that, as the defendants had done nothing to abate it, they were liable for the damage suffered by the plaintiff; (2.) that there was a duty on the part of the defendants to safeguard members of the public using the pavement from the danger occasioned by the snow, either by removing it or by some other effective means, such as a warning, and that, as the defendants had not fulfilled that duty, they were liable for negligence also; (3.) that, even if the storms were to be regarded as falling within the doctrine of act of God (as to which dubitante), that doctrine did not avail the defendants as it was not the storms which directly caused the plaintiff's injury but the fact that the snow had not been removed; and (4.) that the landlord's covenant to repair in the lease did not absolve the defendants from liability.

Action tried by Oliver J., without a jury, at Leicester Assizes.

The following statement of the facts is taken, with slight alteration, from the judgment:

In the afternoon of February 2, 1940, the plaintiff, Dorothy May Slater, was injured by a mass of snow which fell on her from the sloping roof of the defendants' leasehold premises in Northgate, Leicester. She, accordingly, brought this action for damages, alleging that her injuries were due to the negligence of the defendants, or, alternatively, to their failure to abate the nuisance created by the snow. She alleged that the defendants were negligent in not taking proper or sufficient steps to prevent snow from accumulating on the roof and/or the guttering of the premises; in not taking proper or sufficient steps to remove snow which had accumulated on the roof or in the guttering and/or to strengthen the guttering and/or to prevent it falling on the highway; and in not taking steps, by giving a warning to persons on the highway or by erecting a barrier or some other obstruction, to ensure the safety of persons on the highway by preventing them standing under or near the roof and guttering. As to the allegation of nuisance, the plaintiff alleged that the defendants, by suffering snow to accumulate and/or to remain on the roof and/or in the said guttering to such an extent that the guttering was likely to fall, created a nuisance which was dangerous to persons lawfully using the highway and, in fact, caused the injuries to the plaintiff.

The defendants denied that they had been guilty of either negligence or nuisance.

On the afternoon in question the plaintiff was shopping with her mother, who went into the defendants' shop to make a purchase while the plaintiff remained on the pavement outside, looking into the window of the shop. Suddenly a large mass of snow, together with three lengths of iron guttering, fell from the roof of the defendants' premises. The guttering did not strike the plaintiff, but she was crushed under the weight of the falling snow and received severe injuries. The roof and the guttering were for all ordinary purposes in perfect repair and condition. The accumulation of snow on the roof immediately before the accident was to a depth of approximately eighteen inches, and was the result of a series of snowstorms, described as some of the worst within living memory in the midlands, which had lasted, with intervals, from January 26 to January 29, 1940. The accumulation of snow on the roofs of houses was rendered more difficult to handle by the fact that, during the storms, there had been alternate periods of frost and thaw which produced layers of ice in the final

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mass of snow. The fall was due to the fact that at about midday on February 2 a fairly heavy thaw set in.

Oliver J. found that it had been physically possible to remove the snow from the defendants' roof at any time after January 29, but that between January 29 and February 2 no step was taken by the defendants to remove it. He also found that no warning was given by the defendants to the plaintiff and others using the streets of possible danger from the snow, and no step was taken by the defendants to prevent the public from walking or standing under the roof.

R. J. White (for *Mallison*, on war service) for the plaintiff.
P. S. Pitt (*Arthur Ward* with him) for the defendants.

Cur. adv. vult.

1941. Jan. 24. OLIVER J. read a judgment in which he stated the facts as set out above and continued: The premises were occupied by the defendants under a lease containing a covenant by the landlord to keep, inter alia, "the walls and "roofs and all other outside parts of the premises . . . . in good "repair and condition." On behalf of the defendants it was contended by Mr. Ward, first, that the covenant to repair by the landlord absolved the defendants from liability to the plaintiff. Secondly, he argued that there was no evidence of nuisance, nor, thirdly, of negligence.

With regard to the first point, I do not think that the covenant affects the question of liability at all. In the first place, even if the guttering had been out of repair (and I have already said that it was not), it was not the guttering, but the snow which injured the plaintiff. This is, therefore, not a case of non-repair at all, but one of nuisance or negligence, and in such cases, in connection with buildings, it is the occupier who is always liable. The owner is only liable in certain circumstances which do not arise here, although the terms of the contract might give to the tenant a remedy over against him: see, on this point, Beven on Negligence, 4th ed., p. 524, and also Scrutton L.J. in

St. Anne's Well Brewery Co. v. *Roberts* (1). That was a nuisance case where a wall had fallen upon the plaintiffs' premises from neighbouring premises and damaged the plaintiffs' building. Scrutton L.J., in his judgment, said: "I think also it is clear law that the person liable for a nuisance "on premises is certainly the occupier." No one could, I think, successfully contend that, because the landlord was liable to effect the outside repairs to a house, the tenant in occupation of the premises had no right to remove snow from the roof.

I proceed next to consider the question of nuisance. Apart from the cases arising from non-repair of premises (as to which see *Wringe* v. *Cohen* (2)), I think it is plain that an occupier is not liable for nuisance on his premises, unless he either created the nuisance, or, knowing of its existence or being in a position that, with reasonable care, he would have known of its existence, he has done nothing to remedy it: see *Barker* v. *Herbert* (3); per Scrutton L.J. in *St. Anne's Well Brewery Co.* v. *Roberts* (1); and Salmond on Torts, 9th ed., p. 245. I have, first, to consider whether the accumulation of snow on the defendants' roof overhanging the street was a nuisance. I am clearly of opinion that it was. A mass of snow eighteen inches thick on a sloping roof overhanging a public street in a large city and liable to fall at any time on the heads of persons lawfully using the street below must surely amount to a nuisance and a public nuisance at that. I have, therefore, to apply the law, as I understand it, to this finding. In this case it is obvious that the nuisance was not created by the defendants. It was created by the operation of nature, and if, during the course of this great blizzard and before there had been any reasonable opportunity of removing the snow, it had fallen and injured the plaintiff, I would have found for the defendants, but this was not the case. Four days elapsed between the creation of the nuisance and the accident. It would be obvious to anyone who thought about it that there probably would be on all such roofs as the one in question a great accumulation of snow overhanging the street. That the defendants knew it was made clear from the answers to interrogatories, wherein, moreover, it was sworn that no steps were taken to remedy the matter as none was necessary. Accordingly, I find that the defendants, having knowledge of a public nuisance on their premises, did nothing to abate it, and they are, therefore, liable in law for the damage occasioned to the plaintiff.

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(1) (1928) 140 L. T. 1, 7.
(2) [1940] 1 K. B. 229.
(3) [1911] 2 K. B. 633.

If this view is right, the question of liability on the ground of negligence becomes academic, but, in view of the possibility of an appeal, I feel that I should state my opinion about it. On the facts of this case I think that there was a duty on the part of the defendants to safeguard members of the public using the street from the danger occasioned by the snow, either by removing it, or by adopting some other effective means, such as a warning. They did nothing at all. I, accordingly, find against them on the ground of negligence also.

In deference to part of Mr. Ward's argument, I ought to say a word about "act of God." Mr. Ward contended that the storms in question were of such unprecedented violence as to fall within the ambit of the doctrine of act of God, exemplified in the old case of *Nichols* v. *Marsland* (1). It must always be remembered that in that case there was a finding by the jury of act of God. This doctrine is known as damnum fatale in Scotland, and, so far as I am aware, there is no difference in the law applicable in the two countries. I can only say that, after studying the Scottish case of *Greenock Corporation* v. *Caledonian Ry. Co.* (2), I should have hesitated long before saying that the storms in question, even had they directly caused the mischief, were such as to fall within the doctrine. I do not, however, think that I have to decide this at all. It was not the storms which directly caused the injury to the plaintiff. It was the fact that the accumulation of snow had not been removed by the defendants as it should have been.

With regard to the damages, the plaintiff suffered a severe injury. [His Lordship dealt with the facts on this issue.]

(1) (1876) 2 Ex. D. 1.

(2) [1917] A. C. 556.

I think I shall not be doing injustice if I award 500*l.* general damages, to which must be added 60*l.* agreed as special damages, that is to say, there will be judgment for the plaintiff for 560*l.*, with costs.

Judgment for plaintiff.

G. F. L. B.

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The defendants appealed. The appeal was heard on April 30, 1941.

Macaskie K.C. and *Arthur Ward* for the defendants.

R. J. White (for *Mallison*, on war service) for the plaintiff.

The Court dismissed the appeal, which does not call for a full report.

SCOTT L.J., having stated the facts and discussed the evidence, said that it appeared from answers made to interrogatories by the secretary of the defendant company that on February 2, before the accident, a representative of the defendants inspected the roof, and the condition of the snow on it was then definitely brought home to the defendants. In those circumstances Oliver J. held that the defendants were clearly liable, because they had such knowledge as put on them the duty of taking steps to abate the nuisance or to protect people passing by within reach of a fall of snow. It was not necessary to dwell on the authorities which had been cited, because it seemed to be a perfectly plain case.

GODDARD L.J. said that he did not want it to be thought that the Court were deciding anything so unreasonable as that where there was a very heavy snowfall, there was necessarily a duty on the occupier of a house to go out at intervals and clear the snow from the roof lest it should fall on passers-by. In the present case, however, the defendants had known for four days that there was a potential source of danger on the roof, and on the day of the accident they had themselves inspected the

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roof. They had said that they took no steps because they did not consider them to be necessary, but no explanation had been given why it was not necessary. He could see no answer to the plaintiff's claim, whether it be in negligence or nuisance.

STABLE J. concurred.

Appeal dismissed.

Solicitors for the plaintiff: *H. W. Clarkson, Wright & Co., for Herbert Simpson, Son & Bennett, Leicester.*

Solicitors for the defendants: *Nash, Field & Co., for Blewitt & Co., Birmingham.*

A. W. G.

READ *v.* GORDON.

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Jan. 24.

Landlord and tenant—Rent Restrictions Acts—Dwelling-house to which the principal Acts apply—Action for recovery of possession of—On ground that landlord requires for occupation of full time employee—If tenant's dwelling-house " was let " to him in consequence of his employment—Time at which was so let to be considered—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *First Schedule, para. g* (*i.*).

The defendant, for many years, was in the employment of his landlord and the dwelling-house, which he occupied, was let to him in consequence of that employment. He was paid in wages 16*s.* a week and in addition the value of his occupation of the dwelling-house was assessed at 5*s.* a week. In 1934, his landlord died. Her executors did not carry on her business and the defendant obtained employment elsewhere, but he continued in occupation of the dwelling-house, paying a rent of 5*s.* a week to the executors, who in 1935 gave him a rent-book. In 1940 the plaintiff bought from the executors the premises, where their testatrix formerly had carried on business, including the dwelling-house occupied by the defendant, with a view to carrying on the business established there before 1934. The plaintiff required the occupation of the dwelling-house, occupied by the defendant, to which the Rent Restrictions Acts applied, as a residence for a person engaged in his whole time employment and he gave notice to quit the premises to the defendant, who continued in possession of them, after the expiration of the notice.

The plaintiff brought an action in the county court to recover possession of the dwelling-house, proffering no evidence of suitable alternative accommodation for the defendant, but relying on the terms of para. *g* (i.) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, alleging that the defendant, the tenant, " was in the employment of the " landlord or a former landlord, and the dwelling-house was let " to him in consequence of that employment and he has ceased " to be in that employment." The county court judge in dealing with the facts referred to " the new letting by the executors " ; found that the dwelling-house was reasonably required by the plaintiff for a person engaged in his whole time employment and held that the words in para. *g* (i.) : " was let to him in consequence " of that employment " were satisfied if the dwelling-house was let at any time to the tenant in consequence of his employment. He therefore made an order for possession :—

Held, that, since, as the trial judge had found, a new tenancy of the dwelling-house was created after the death of the defendant's employer and landlord in 1934, the plaintiff had failed to show that the dwelling-house was let to the defendant " in consequence of that " employment " within the meaning of para. *g* (i.), at the crucial

Reported by C. G. Moran, Esq., Barrister-at-Law.

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time, i.e., at the time of the service of the notice to quit upon the defendant, which led to the plaintiff's right to apply for recovery of possession of the dwelling-house. Accordingly, by reason of the terms of s. 3 of the Act of 1933, no order for the recovery of possession should have been made.

Observations of Bray J., in *Lever Brothers, Ld.* v. *Caton* (1921) 37 Times L. R. 664, disapproved.

Murton v. *Aldis* (1929) 141 L. T. 168, following *Bond* v. *Pettle* (The Times newspaper for Jan. 15, 1921), approved.

APPEAL from the Peterborough County Court.

The plaintiff, George Read, claimed to recover possession of Gladstone Cottage, South Street, Peterborough. By his particulars, the plaintiff pleaded that the defendant held these premises of the plaintiff as a tenant from week to week at the weekly rent of 5*s.* and that the plaintiff duly determined the tenancy by serving on the defendant on September 18, 1940, a notice to quit the premises on September 30, 1940, and that the defendant wrongfully remained in occupation of the premises. And the plaintiff claimed possession of the premises and other relief.

The defendant, William Gordon, by his defence, pleaded that the tenancy could not be determined as alleged and that he was entitled to the protection afforded by the Rent and Mortgage Restrictions Acts, 1920–39. By his particulars the defendant admitted that he was a weekly tenant of the cottage at 5*s.* per week, the landlord paying rates.

At the trial, the plaintiff said that he carried on business as a remover and warehouseman of furniture and for the purpose of that business in August, 1940, had purchased from the executors of a Mrs. Snow premises of an area of 60,000 square feet, consisting of storage accommodation and a cottage. The defendant was the occupier of the cottage. He wanted the cottage for the occupation of one Jones, his warehouseman, and he required it urgently, as he must have the man on the spot as a fire watcher. Accordingly a notice to quit was served on the defendant.

Mr. Dale, a clerk to the plaintiff's solicitors, said that on September 5, 1940, he saw the defendant, who told him that he had been employed at the premises for forty years, at first by a Mr. Foote and then, since 1905, by a Mrs. Snow, and that from 1935, after his employment terminated, he had paid 5*s.* a week rent.

It was admitted that the principal Acts applied to Gladstone Cottage. No evidence was given that there was suitable alternative accommodation for the defendant.

The defendant said that he occupied Gladstone Cottage. He had worked for a Mrs. Snow until 1934, when she died. He actually paid no rent: it came in his wages. In cross-examination he said that he was paid 16*s.* a week wages, and that in addition the value of his occupation of the house had been assessed at 5*s.* a week. In 1934 Mrs. Snow died and he became the tenant of Mrs. Snow's executors, who did not carry on the business. He then paid 5*s.* a week rent to Mrs. Snow's executors and a rent-book was put in showing these payments from May, 1935. For the last five years the defendant said that he had worked elsewhere for Messrs. Watkins and Stafford.

His Honour Judge Lawson Campbell, who had reserved judgment, found that the cottage was originally let to the defendant by reason of his employment by a former owner and that this employment and his occupation of the cottage were continued under Mrs. Snow, the succeeding owner of the business. On Mrs. Snow's death in 1934, her executors discontinued the business; they let the warehouses to tenants and the defendant in 1935 found employment elsewhere. The defendant remained in occupation of the cottage, paying a rent of 5*s.* a week to the executors. The plaintiff purchased the property in 1940 from the executors. These facts were not in dispute nor was it disputed that an order for possession could not be made save by virtue of para. *g* (i.) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1). He was satisfied that it was

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32).

Sect. 3: "(1.) No order or "judgment for the recovery of "possession of any dwelling-house "to which the principal Acts "apply . . . . shall be made . . . . "unless the Court considers it "reasonable to make such an "order . . . . and either—(*a*) the "Court has power so to do under reasonable to make the order for possession; the defendant had not a large family and he had little difficulty in holding that the cottage was reasonably required by the plaintiff for occupation as a residence for a person engaged in his whole time employment.

His Honour continued: "It is clear that the defendant "was in the employment of a former landlord and that the "cottage was originally let to him by reason of that employ-"ment and that he ceased to be in that employment. There-"fore, prima facie, the plaintiff would appear to bring his "case neatly within the words of para. *g* (i.) of the First Schedule "to the Act. But the solicitor for the defendant has argued "that that may well have been the position before the death "of Mrs. Snow; since that event and since the new letting "by the executors, it ceased to be true to say that the cottage "was let to the defendant by reason of his employment and "that, from that moment, para. *g* (i.) ceased to be applicable. "This is an attractive argument but I think that it is wrong for it "seeks, in my view, to read into the paragraph something which " is not there, namely the words 'and continues to be let.'"

"I am bound to give the words their ordinary natural "meaning, to give a meaning to each word and not read in "words which are not there. The material words are 'was "'let' and these words seem to be satisfied if the house was

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" the provisions set out in the " First Schedule to this Act; or " (*b*) the Court is satisfied that " suitable alternative accommo-" dation is available for the tenant " or will be available for him when " the order or judgment takes " effect."

By the First Schedule to the Act (which is prefaced by the words: " Possession or ejectment " without proof of alternative " accommodation ") :—" A court " shall, for the purposes of section " three of this Act, have power " to make or give an order or " judgment for the recovery of " possession of any dwelling-house " to which the principal Acts " . . . . apply without proof of suit-" able alternative accommodation " (where the Court considers it " reasonable so to do) if— . . . . " (*g*) the dwelling-house is reason-" ably required by the landlord " for occupation as a residence for " some person engaged in his " whole-time employment . . . . " and either—(i.) the tenant was " in the employment of the land-" lord or a former landlord, and " the dwelling-house was let to " him in consequence of that " employment and he has ceased " to be in that employment . . . ."

"at any time let. Moreover, I note that in specifying the "landlord in whose employment the tenant must have been, "the indefinite article is used. This seems to cover the "case of a succession of landlords for in the context 'a' is "equivalent to 'any' and the words exactly fit the case "where the tenant has ceased to be in the employment of "one of a succession of landlords. That is the case here."

Accordingly His Honour made an order for the recovery of possession of Gladstone Cottage to be given within six weeks.

The defendant appealed. The appeal was heard on January 24, 1941.

Geoffrey Howard and *S. L. Elborne* for the appellant. The county court judge has held that the defendant comes within the exact words of para. *g* (i.) of the First Schedule to the Act of 1933. But where the tenant ceases to be in the employment of the landlord, but then pays rent to the landlord, the dwelling-house is no longer let to him in consequence of that employment and para. *g* (i.) of the First Schedule does not apply. The tenancy referred to in that paragraph is the tenancy of a dwelling-house let to the tenant in consequence of his employment. If the tenant enters into a new tenancy which has no relation to the employment, the paragraph is inapplicable. The trial judge has found—that is the fair inference—that a new tenancy had been created with the executors of Mrs. Snow. He speaks of "the new letting by "the executors." The decision is that, if originally or at any time, the tenant was in the employment of the landlord and the dwelling-house was then let to him in consequence of that employment, however many landlords may have intervened, who have let the premises to the tenant and with whom the tenant had no contract of employment, the case comes within the paragraph. The words "was let to "him in consequence of that employment" must refer to the crucial time—the date of the commencement of the proceedings for possession by the landlord: see the decision of *Murton* v. *Aldis* (1) on the similar words in para. 1 of the

(1) (1929) 141 L. T. 168.

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proviso to para. 5 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, following *Bond* v. *Pettie* (1). In *Lever Brothers, Ld.* v. *Caton* (2) Bray J. construed these words, as the county court judge did in this case, but Lush J. arrived at the same decision on another ground.

[He was stopped.]

Safford for the respondent. For the purposes of my argument, I accept the proposition that, for para. g (i.) of the First Schedule to apply, the tenancy to be regarded is that at the commencement of the proceedings for possession: the dwelling-house under that tenancy must have been let to the tenant in consequence of his employment. That was the case here, for the original letting of Gladstone Cottage had never been terminated. There was no change of rent and the occupation was continuous. It cannot be said, from the mere giving of a rent book in 1935, that there was then a new tenancy created. The county court judge did not expressly find that a new tenancy was then created and if he had, there would have been no evidence to support his decision.

[Clauson L.J. Was the defendant, in 1940, a tenant of Gladstone Cottage "in consequence of *that* employment" —the employment with Mr. Foote or Mrs. Snow?]

Yes, para. g (i.) of the First Schedule directs attention not to the period of the employment, but to the period of the letting and the issue is, on this branch of my argument, whether the original letting to the defendant in consequence of his employment has persisted down to the initiation of the proceedings by the landlord for possession. The paragraph speaks of the tenant being in the employment of the landlord or a former landlord. Ex hypothesi, therefore, the tenant referred to, may not be in the employment of his present landlord, although his tenancy may be "in consequence "of that employment," i.e., of a former employment, and in view of the words "in the employment of the landlord or "a former landlord," the original tenancy from his employer,

(1) The Times newspaper for Jan. 15, 1921.

(2) (1921) 37 Times L. R. 664.

when the dwelling-house was let to the tenant in consequence of that employment, may persist, after the tenant has left his landlord's employment.

Here the defendant had occupied these premises under one continuous tenancy down to September 30, 1940, when the notice to quit given by the then landlord expired.

Even if the defendant's tenancy would have terminated by the rules of common law when Mrs. Snow died, and the defendant's employment with his landlord terminated, and a new tenancy would have been implied from subsequent payment of rent, yet by reason of the Rent Restrictions Acts, that inference cannot be drawn. The landlord cannot of his own volition get rid of his tenant: see s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and *Davies* v. *Bristow* (1).

Secondly the terms of para. *g* (i.) show that I need not accept the proposition that the tenancy to be considered is that at the commencement of the proceedings for possession. The defendant here, as was pointed out by the county court judge, comes within the very words of the paragraph: see the observations of Bray J. in *Lever Brothers, Ld.* v. *Caton* (2). The defendant was in the employment of a former landlord and the dwelling-house was originally let to him in consequence of that employment. It matters not if a new tenancy was created in 1934 or 1935. Once the two conditions are satisfied at any time and the tenant remains in the same premises and has ceased to be in that employment, the paragraph applies. The words mean "was originally or at any time let" to the tenant in consequence of his employment. Again, on this construction, the words "or a former landlord" show that a tenant may be in occupation under a tenancy with a subsequent landlord with whom he is not employed and still come within the words of the paragraph. His employment may have terminated in the past. That the words "was let" in the paragraph only refer to the original letting was the view of the county court judge, and it is submitted, in the alternative, that this view was right.

(1) [1920] 3 K. B. 428.

(2) 37 Times L. R. 664, 665.

Counsel were not called on to reply.

MACKINNON L.J. This is an appeal from a decision of the judge of the Peterborough County Court. The plaintiff was the owner of a cottage in Peterborough; and the defendant was the occupier of it. The plaintiff served notice to quit upon the defendant and then started a claim in the county court, asking to be given possession of the cottage. The defendant was paying only a rent of 5*s*. a week; and quite clearly the premises were subject to the Rent and Mortgage Interest Restrictions Acts. Prima facie, the first answer of the defendant was to be found in the terms of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. There was no suggestion here that the plaintiff was able to provide suitable alternative accommodation for the defendant. In order, therefore, to prevent his action from being barred by the provisions of this section, the plaintiff had to satisfy the Court that it was reasonable to make the order for possession and also that the Court had the power to give him possession under a provision set out in the First Schedule. The first requirement the plaintiff satisfied. In that First Schedule it is provided that the Court shall for the purposes of s. 3 have power to make an order for the recovery of possession of any dwelling-house to which the principal Acts apply without proof of suitable alternative accommodation (where the Court considered it reasonable so to do) if—and then there are various conditions set out. One condition is contained in para. (*g*) and that is the one on which the plaintiff relied: "the dwelling-house is reasonably required by the "landlord for occupation as a residence for some person "engaged in his whole time employment . . . . , and either (i.) "the tenant was in the employment of the landlord or a "former landlord, and the dwelling-house was let to him in "consequence of that employment, and he has ceased to be in "that employment. . . ."

The plaintiff, the landlord, said: "I require the occupation "of the cottage for an employee of mine." His Honour said that he was satisfied that it was reasonable to make the order for possession: "the defendant had not a large family and "he had little difficulty in holding that the cottage was reason-"ably required by the plaintiff for occupation as a residence "for a person engaged in his whole time employment." The only remaining issue was whether the plaintiff, the landlord, could successfully assert to the defendant, the tenant, in the words of para. *g* (i.) of the First Schedule to this Act, "You "were in the employment of myself or a former landlord, and "this dwelling-house was let to you in consequence of that "employment."

The facts (as to which there is no dispute) were these. Somewhere about 1900, forty years ago, the defendant entered the employment of a man named Foote. He worked for him on the terms that he should be paid 16*s*. per week wages; it being understood that the value of his occupation of the cottage represented an extra 5*s*.; so that it might have been that he would have been paid 21*s*. wages, in which case he would have repaid 5*s*. of it as rent for the cottage. In 1905 Mr. Foote, who had been employing Mr. Gordon on those terms, died; and his daughter, Mrs. Snow, succeeded to the business: and the defendant continued with Mrs. Snow under a similar arrangement. For thirty years, while Mrs. Snow was carrying on the business, the defendant worked for her and continued to live in the cottage at the notional rent of 5*s*. a week. Then, in 1934, Mrs. Snow died. Her executors decided that they would discontinue the business and, therefore, the defendant's employment in the business (which would in these circumstances disappear) had to come to an end. But he still occupied the cottage: and Mrs. Snow's executors arranged with him that he should occupy the cottage at a rent of 5*s*. a week. They issued to him a rent book describing that 5*s*. as rent.

In my view, quite clearly what happened then was that Mrs. Snow's executors ceased to be the employers of the defendant, and they ceased to employ anyone in that business. They ceased to be the owners of a business for one purpose of which there had been provided accommodation for an employee. They had abandoned the business; but having the ownership of this little house, they let it to the defendant by agreement with him as tenant, and gave him a rent book. The defendant found employment with other persons; and for five years continued to work for other persons, living in this little house and paying his proper rent to the executors of Mrs. Snow.

In 1940, the executors sold all the property, in which Mrs. Snow had carried on business, to the plaintiff, Mr. Read, who was minded to restart the business which Mr. Foote and Mrs. Snow had successfully carried on and which had been abandoned by Mrs. Snow's executors five years before. It was a business, in part, of storing house furniture. The plaintiff wanted to use this cottage as a place where he could install one of his workmen in the new business. Accordingly he served a notice to quit on the defendant and started these proceedings to recover possession of the cottage.

Those are the facts; and they are not in dispute. The learned judge found, I think, that, though originally in 1900 or 1905 this house was let to the defendant "in consequence "of" his employment, yet in 1935 there was a new letting by Mrs. Snow's executors to the defendant. The learned judge put it thus: "Since the new letting by the executors". I think he meant to find that there was such a letting; and on the evidence I do not think he could arrive at any other finding. But he went on to hold, to use his own words, that "the material words" (of para. *g* (i.) of the First Schedule to the Act of 1933) "are 'was let,' and these words seem to be "satisfied if the house was at any time let;" that is to say, that although the dwelling-house was let to the defendant by a new agreement in 1935 yet, inasmuch as thirty years before it had been let to him "in consequence of" his employment, the previous letting was sufficient to satisfy the requirement of this condition.

That was the view stated by Bray J. in a case of a somewhat similar character, *Lever Brothers, Ld.* v. *Caton* (1), where he said of the similar words in para. 1 of the proviso to para. 5 (1.) (*d*) of the Act of 1920 (2): "I think that we must go

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(1) 37 Times L. R. 664.

(2) Ibid. 665.

"back to the original letting, which here was in consequence "of the employment." The original letting having been in the circumstances part of the original employment, it was immaterial at the date when possession was claimed that the tenant was in occupation by virtue of a new agreement not connected with his employment. It is to be noted that Lush J., the other member of the Divisional Court, did not accept that argument. He arrived at the same decision as that of Bray J. but on the ground that there was in fact no new agreement entered into with the tenant—the inference being that if there had been such a new agreement he would have taken a view different from that of Bray J.

That case was again considered in the very similar case of *Murton* v. *Aldis* (1), in which the Divisional Court, consisting of Lord Hewart C.J., Avory and Swift JJ., came to a different conclusion on the facts from that arrived at in *Lever Brothers, Ld.* v. *Caton* (2), and, incidentally, expressed their disapproval of the reasoning of Bray J. in *Lever Brothers, Ld.* v. *Caton* (2) —reasoning which, as I have pointed out in the argument, is precisely that which has been accepted by the learned county court judge in the present case. They disapproved of that reasoning partly on the strength of the previous case of *Bond* v. *Pettle* (3). There is one sentence quoted from the decision of Lord Coleridge in the case of *Bond* v. *Pettle* (3) which I think puts the whole point that arose in that case and arises in this present case. Lord Coleridge said: "The question "is whether the tenant at the crucial time, not at some other time, was a tenant in consequence of his employment."

I think that the vital question in these cases is whether at the crucial time, namely, at the date when the plaintiff served the notice to quit, the defendant being a tenant in the employment of the landlord or having been the tenant of a former landlord, the dwelling-house was let to him in consequence of that employment. Clearly in this case he was not in the employment of his landlord. Had he been in the employment of the former landlord? He had. But the

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(1) 141 L. T. 168.

(2) 37 Times L. R. 664.

(3) The Times newspaper for Jan. 15, 1921.

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question is whether the dwelling-house was, at the crucial time, let to him "in consequence of that employment." I do not think it was. The defendant was tenant there not by virtue of the employment which had ceased in 1934, but by virtue of a new agreement entered into between him and the executors of Mrs. Snow after her death.

As I have said, that is really the finding of fact of the learned judge in this case; but on his construction of para. *g* (i.) of the First Schedule to the Act of 1933 he has held that that was immaterial. I do not think it was. The result is that the plaintiff failed to bring himself within this provision of the First Schedule; that the defendant was entitled to the protection of s. 3 of the Act of 1933; and that no order for the recovery of possession ought to have been made against him.

This appeal succeeds and should be allowed with costs.

CLAUSON L.J. I agree for precisely the same reasons.

DU PARCQ L.J. I also agree; and have nothing to add to what has been said by my Lord.

Appeal allowed.

Solicitors for the appellant: *J. D. Langton & Passmore, for Mellows & Sons, Peterborough.*

Solicitor for respondent: *J. Hunt, Peterborough.*

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Jan. 30; *Feb.* 3, 4, 5.

[1940. R. 453.]

Libel—Action tried by judge only—Damages—Considerations proper to be taken into account in fixing the amount.

When a libel action is tried by a judge without a jury, the judge may, in fixing the amount of the damages, take into account the fact that he has been able in his judgment to express his views of the case as a ground for awarding less damages than a jury would probably do, in view of the jury's inability to express any opinion as to the grossness of the libel except by awarding heavy damages.

The principles laid down by Greer L.J. in *Flint* v. *Lovell* [1935] 1 K. B. 354, 360, that the Court of Appeal will not reverse the decision of the trial judge on the question of the amount of damages, unless it is satisfied "either that the judge acted upon some "wrong principle of law, or that the amount awarded was so "extremely high or so very small, as to make it . . . . an entirely "erroneous estimate of the damage" is applicable in actions for libel. But the very nature of the damages awarded makes the task of establishing an error far more difficult than in other types of action.

APPEAL from Atkinson J.

The plaintiff, William James Rook, was at all material times vice-chairman of the board of directors of C. Czarnikow, Ld., well known sugar brokers in London, and deputy director of sugar supplies (unpaid) at the sugar division of the Ministry of Food. The defendant, J. L. Fairrie, was a sugar broker in London, and had as his main clients Galban Lobo & Co., of Havana, Cuba, and their subsidiary and affiliated company, Olavarria & Co., of New York. Part of Galban Lobo & Co.'s business was also done by J. V. Drake & Co., whose senior partner was Mr. J. H. Drake, and L. M. Fischel & Co., Ld., of which Mr. Oxley was the managing director.

The plaintiff brought this action against the defendant for libels contained in communications passing between the defendant and Galban Lobo & Co. In connection with the purchase of sugar from Cuba by the Ministry of Food an inquiry was submitted to the Cuban Institute for Sugar Stabilisation on January 25, 1940, and was made known by the Institute to its members. Galban Lobo & Co. were not, however, members of the Institution, and thereafter on various occasions between January 28 and February 16, 1940, a number of communications passed between Galban Lobo & Co. and the defendant. The material communications having regard to the view taken by Atkinson J. were as follows :—

(i.) A cable from Galban Lobo & Co. to the defendant of which the material terms were: "Inasmuch as Rook (the "plaintiff) still member Czarnikow Ld. his personal motives "wishing eliminate us and endeavour deal direct with Cuban "Government quite obvious. Excuse co-ordination shipment "tommy rot. . . . . Naturally Czarnikow London keeps "Cuban Trading fully informed everything there. Am "considerably worried at deliberate attempt re-establish "Czarnikow's Cuban business at our expense."

In this cable "Cuban Trading" was a reference to the Cuban Trading Co., of Havana, a company dealing with sugar and connected with Czarnikow-Rionda Co. of New York (referred to as "Rionda company"). Rionda company had been independent of C. Czarnikow, Ld., of London, for over twenty-five years.

(ii.) A cable from Galban Lobo & Co. to the defendant of which the following was material: "Cuban Trading informed "three days before anybody else present inquiry. Hence "getting jump on us and others."

(iii.) A cable from Galban Lobo & Co. to the defendant of which the following was material: "Inform control quantity "offered includes 60,000 tons belonging to us even though "Rionda had three days advance information."

(iv.) A letter from the defendant to the plaintiff, dated February 15, 1940.

The plaintiff alleged that the defendant meant and was understood to mean that the plaintiff was corruptly using his official position at the Ministry of Food for his personal advantage and for the advantage of C. Czarnikow, Ld., and the Rionda company, that he had caused the Ministry of Food to address its inquiries to the Institute in Cuba simply in order to secure for C. Czarnikow, Ld., and the Rionda company an unfair advantage over other concerns and notably over Galban Lobo & Co. That he was systematically betraying official secrets to Cuban Trading Company.

The three cables were admittedly published to Mr. Drake and Mr. Oxley and the letter was shown to Mr. Oxley and was signed on the defendant's behalf by his manager called Nolan. But the defendant alleged that each of the occasions of publication was an occasion of qualified privilege.

It was admitted that the publications were privileged and the question therefore arose whether the publications were made maliciously.

Atkinson J. found that the original cable suggested that the plaintiff's whole aim and intention was to reinstate C. Czarnikow's business at the expense of Galban Lobo & Co.; in other words that he was prostituting his official position to further his personal interests and to injure his rivals. And he held that the defendant had been influenced by malice in publishing the three cables and that the letter of February 15, 1940, was written and published maliciously; and therefore that the defence of privilege could not prevail. He then proceeded to deal with the question of damages and said it was here that a judge longed for a jury. He would have had to direct the jury as he directed himself that the question of damages was at large. The jury would be entitled to consider all the circumstances of the case, the malice of the defendant from first to last, even in the witness box. He would have had to tell the jury: "You are entitled to bear in mind that in the "history of the matters with which we have been concerned "the defendant published other defamatory statements." He would have had to warn them that they could not give damages for them but that they could bear them in mind in estimating the defendant's malice; and he would have had to tell them that they would be entitled to consider the obvious efforts that the defendant made to prevent the withdrawal of the libels, and indeed even when a withdrawal of some sort became inevitable to water it down as much as he could.

Putting himself in the position of a jury and trying not to be unreasonable, he thought the proper sums to award were

500*l.* damages in respect of the main libels and 50*l.* damages in respect of the letter. He was told that the plaintiff was not wanting to make money out of a libel action but that he wanted a sum sufficiently large to indicate the view of the Court. His Lordship then continued: "A jury can only indicate its view by the size of the sum that it gives as damages, and "I think it very likely that a jury would have said: 'We "'are not allowed to say what we think about this case, "'and so we will give a very big sum, which will indicate what "'we think.' But I am a judge and I have been able to "indicate what I think of the case, and in my view it is "unnecessary to give a larger sum than that to drive home "my conviction, and indeed everybody's conviction, that "there never was the slightest foundation for any one of these "libels, there never was the slightest justification for one word "to be said against Mr. Rook in any shape or form, and that "Mr. Fairrie knew it from first to last and Messrs. Galban Lobo "& Co. knew it from first to last, and that their attitude, "I have no doubt, was influenced, though to what extent one "cannot measure, by the seed of distrust put into their minds "by the defendant 9 months before the war began, in May of "last year. I think that sum is sufficient to indicate my view. "I can well think that a jury would have given a bigger sum, "but sometimes juries give sums which are too big. At any "rate that is the conclusion to which I have come. I give "judgment accordingly for 550*l.*"

The defendant appealed and there was a cross-appeal by the plaintiff.

The only question raised on the appeal was whether Atkinson J. was justified in finding malice and the Court of Appeal dismissed the appeal holding that the defendant was throughout actuated by the grossest form of malice in attacking the head of an important branch of the administration of the country in time of war and endeavouring to undermine his authority and divert his policy to one which would assist the defendant and those for whom he acted. It is only the cross-appeal of the defendant seeking to obtain an increase of the award of damages that calls for report.

A. T. Miller K.C. and *H. C. Marks* for the plaintiff. The damages of 550*l.* are quite inadequate. This action was heard by the judge alone and the assessment of damages in an action for libel has been said to be peculiarly the province of the jury. The position where the judge alone is called on to fulfil this function of a jury has never been a subject of appeal to the Court of Appeal. The tests to be applied in regard to damages are set out in Gatley on Libel and Slander, 3rd ed., pp. 702, 739. It is there stated that the jury—and therefore the judge acting alone—are entitled to take into consideration "the conduct of the plaintiff, his position and "standing, the nature of the libel . . . . and the whole conduct "of the defendant from the time when the libel was published "down to the very moment of the verdict." The plaintiff may urge in support of his claim for damages other defamatory statements on record whether they are part of the matters in action or not and whether actionable or not. It has been laid down in *Flint* v. *Lovell* (1) that the Court of Appeal in considering an appeal as to damages must be convinced before it will vary the amount of damages that the Court of first instance acted on a wrong principle or that the damages are so high or so low as to make them clearly erroneous. If those tests were applicable in the case of a libel action, it is contended that here Atkinson J. awarded a very inadequate figure and that he did so as the result of applying a wrong principle of law. Atkinson J. said that as he had had an opportunity of saying what he thought about the case—a privilege that would be denied to a jury—he need not award so much in damages as a jury might well have done. This was a wrong principle to act on and it resulted in an entirely erroneous estimate of the damage. The judge was also influenced by the view that the plaintiff was not asking for the measure of damages to which the nature of the libels and his official position entitled him. All that counsel for the plaintiff said was that the plaintiff was not out to make money out of the action, but he certainly desired to obtain such damages as would make it clear to the world that the libels were completely

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(1) [1935] 1 K. B. 354, 360.

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unjustified and of a heinous and malicious character. The judgment does not go out to the world and these libels are known about wherever sugar is dealt in. The only proper remedy therefore is a sum that would establish the plaintiff's reputation to traders abroad against these gross libels. It is the plaintiff's position that is the real ground of this appeal. He has been found by Atkinson J. to occupy a high position in the sugar trade as vice-chairman of C. Czarnikow, Ld., who carry on probably one of the largest sugar broking businesses in the world. He personally and his company are well known wherever sugar is dealt in, particularly America, Cuba, S. Africa, Canada, Australia and other British colonies. Further, he accepted the post of unpaid director of sugar purchases at the Ministry of Food and so undertook the burden of a difficult public duty, and it is in connection with his work at the Ministry that these defamatory statements have been made, for he has been charged with corruptly using his official position to advantage himself and his company. If ever, therefore, there was a case for large damages, this is it, for the attack calls for the strongest possible condemnation.

This is the first occasion on which the Courts have considered how a judge ought to direct himself in dealing with a case in which vindictive damages should be awarded. [They referred to *Bray* v. *Ford* (1) and *Flint* v. *Lovell* (2).] Vindictive damages are intended by way of a deterrent and punishment and, if given at all, are to be given in addition to any element of damages for compensation. In the present case the learned judge misdirected himself when he said that the ability to indicate what he thought of the case enabled him to reduce the damages to be awarded. A judge cannot allow his position to prevent his arriving at the same amount as a reasonable jury would have awarded.

The defendant, who appeared in person, was not called upon on the cross-appeal.

SIR WILFRID GREENE M.R. [after dismissing the defendant's appeal on the ground that he had been guilty of the grossest malice or spite directed against the plaintiff as a public servant, and therefore that the plea of privilege failed, continued :] I now come to the cross-appeal. It is pointed out with great force by Mr. Miller and Mr. Marks that these libels were libels of a very grievous character in view of the circumstances in which they were published, the position of the plaintiff, and the particularly despicable way in which the campaign against the plaintiff was conducted by the defendant, and they say that to award a sum of 550*l.* only in the case of libels of that character is to award a grossly insufficient sum. We are told that this is the first case in which this Court has had to consider the position with regard to an award of damages in a libel action by a judge sitting alone. I do not understand it to be disputed by Mr. Miller that the principles laid down by Greer L.J. in a well known passage in *Flint* v. *Lovell* (1) are as applicable to a case of libel as to any other case in which this Court is asked to vary the amount of damages awarded by a judge sitting alone. The Lord Justice there says: "I think it right to say that this Court will be dis-"inclined to reverse the finding of a trial judge as to the "amount of damages merely because they think that if they "had tried the case in the first instance they would have "given a lesser sum. In order to justify reversing the trial "judge on the question of the amount of damages it will "generally be necessary that this Court should be convinced "either that the judge acted upon some wrong principle of "law, or that the amount awarded was so extremely high "or so very small as to make it, in the judgment of this Court, "an entirely erroneous estimate of the damage to which the "plaintiff is entitled." The present case, of course, is one where the complaint is not that the damages are too high but that they are too low, but the observations of Greer L.J. are general in their character and apply to both cases. In my opinion, those principles are as applicable in a libel case as in any other case, but the manner of their application to that particular subject-matter is, perhaps, rather different

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(1) [1896] A. C. 44.

(2) [1935] 1 K. B. 354.

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(1) [1935] 1 K. B. 354, 360.

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to the manner of their application to the other cases. I will deal further with that aspect of the question when I come to the second branch of the argument.

The first branch of the argument was directed to the observations of Greer L.J. as to the question whether a judge had acted upon some wrong principle of law. There are two arguments which fall to be considered under that head. The first, perhaps, does not strictly come under that head, but can conveniently be dealt with at this point, and it is that the learned judge, in arriving at the amount of damages which he awarded, was under a misapprehension as to something that had been said by counsel for the plaintiff. At p. 71 of the transcript of the judgment there appears this passage: "I was told that Mr. Rook was not wanting damages "here, in the way that many people do, to make money out "of a libel action, but that he wanted a sum sufficiently large "to indicate the view of the Court." We were referred to the passages in the addresses of Mr. Willink, of which that statement of the learned judge is a summary. It is pointed out that what Mr. Willink was saying was that the plaintiff wanted the full damages that he would be entitled to, not because he wanted the money, but because he wanted that award of damages as something that would show that his character was established, and so forth. I think it is doing some injustice to the learned judge to treat the passage which I have quoted as implying that he was under any real misapprehension as to what Mr. Willink meant. It seems to me that it is a fair statement in a concise form of the effect of what Mr. Willink was saying. At any rate, I can find nothing in it which would induce me to say that the mind of the learned judge was, for any substantial purpose, really deflected from the question which he had to consider by any such misapprehension as is suggested.

The other point, which is a point of law, is one of more general interest, but one which, in my opinion, is not difficult to answer. Continuing the passage which I have read, the learned judge goes on to point out the difference that exists in the case of a libel action heard by a jury and a libel action heard by a judge alone. He points out truly that in a case where there is only a jury, the only way in which the jury can indicate its view of the grossness of the libel, the conduct of the defendant and the character of the plaintiff, is in the figure which the jury thinks right to award. In a case where a judge is sitting alone, on the other hand, Atkinson J. points out that those matters can be expressly dealt with in the judgment of the trial judge, and that accordingly the question of awarding a sum of damages which, by its mere magnitude, will show the views of the Court is one which bears a very different aspect where the case is heard by a judge alone. He points out that a jury may take this attitude, that it may say: "We are not allowed to say what we think about this "case, and so we will give a very big sum, which will indicate "what we think." It is said that that is a misdirection by the learned judge, that the consideration to which he is there pointing is one which he ought not to allow to affect his mind at all, and that his duty is to put himself in the position of a jury without regard to the fact that in his reasons for his judgment he is able to express in words what a jury can only express in figures. In my opinion, there is no misdirection here. When once it is appreciated what the nature of damages in a libel action is and the rather complex objects which an award of damages in such an action are supposed to secure, the result, it appears to me, inevitably follows that where a judge is sitting alone the situation is in important respects different from that where he is sitting with a jury, because although the same elements are always present, the method in which they ought in any individual case to be treated may well be different. Accordingly I can find no misdirection there.

The other branch of the argument was directed to showing that the amount awarded, to quote Greer L.J., was "so very "small as to make it, in the judgment of this Court, an entirely "erroneous estimate of the damage to which the plaintiff is "entitled." It was said that in this case the figure of the award on the face of it, when considered in the light of all the circumstances of the case, was an entirely erroneous estimate. Now it is to be remembered that in a libel action the damages awarded are, for the most part and often entirely, without any real connection with any pecuniary loss at all. In a case of personal injury, apart possibly from the element of pain and suffering, the injury complained of is one which can be linked with a pecuniary valuation according to ordinary notions to a greater or less extent, but when you are dealing with damages in a libel case you are endeavouring to express in terms of money several different things which are not really susceptible of a money valuation in any true sense. You are considering the injury which the plaintiff has suffered which may or may not be capable of pecuniary valuation. You are considering the conduct of the defendant, because you may award punitive or exemplary damages against him. You are considering the deterrent effect, and so forth. It results from that, it seems to me, that in asking oneself the question whether the estimate of a particular judge is entirely erroneous one must remember that one is dealing with a type of damages upon which there may be a very wide divergence of opinion without either of the two extremes falling into what may be described as "an entirely erroneous estimate." One mind may take one view and another another, and it is not the function of this Court to decide between the two. What this Court must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded by the judge below. That is what I meant when I said that the manner of the application of the principles enunciated by Greer L.J., to the case of a libel action is rather different than in other cases. I made that observation in view of what I consider is the right opinion, that in deciding whether an estimate is entirely erroneous in a libel action, the very nature of the damages which are awarded makes the task of establishing such an error a great deal more difficult than it might be in other types of action. The damages in a libel action are at large, and it is perhaps scarcely necessary to quote a well known passage to which du Parcq L.J. has called my attention in the speech of Lord Herschell in *Bray* v. *Ford* (1). There he says: "But in the case of an action for

(1) [1896] A. C. 44, 52.

"libel, not only have the parties a right to trial by jury, but the "assessment of damages is peculiarly within the province of "that tribunal. The damages cannot be measured by any "standard known to the law; they must be determined by "a consideration of all the circumstances of the case, viewed "in the light of the law applicable to them. The latitude is "very wide. It would often be impossible to say that the "verdict was a wrong one, whether the damages were assessed "at 500*l.* or 1000*l.*"

In the present case it would, I venture to think, have been a hopeless task to have endeavoured to induce this Court to interfere with the figure of 550*l.*, if it had been awarded by a jury. But it is said that in the case of a judge we have greater powers of interference. That is true, but before we can exercise them we must be satisfied that the estimate is entirely erroneous. It is said by Mr. Miller, and truly said, that this is a case for punitive damages. What the measure of such punishment should be is again a matter upon which different minds may take different views. The learned judge apparently took the view, and, in my opinion, he was entitled to take the view, that in considering the punishment to be imposed in the form of damages, the fact that this defendant had received in the judgment of one of His Majesty's judges so severe a castigation as this defendant has received is a matter which may properly be taken into account. The judgment of the learned judge makes it difficult to suppose that the defendant's word will be accepted in any matter where his personal interest is concerned or by those who are concerned with the sugar market here and abroad, which, we are told, is the circle in which the libel would be calculated to do harm. If this defendant at any time hereafter is minded to attack the integrity of any person, I do not suppose that anyone will pay the slightest attention to what he says. It seems to me that the fact that a judge can do what a jury cannot do except in figures, express his condemnation of a defendant who has published libels, is a matter which he may very well take into account in considering the quantum of damages which it is proper

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to award. I agree, as I have said, that this is a case where a jury might well have awarded a very much larger sum, and in fact it is not improper to say that if I had been awarding damages here I should have awarded a larger sum. But that circumstance does not entitle me to interfere with the learned judge's judgment, whose opinion upon the appropriate figure is entitled to as much weight as mine. It is a case of different minds taking different views, and sitting in this Court I am not entitled to substitute my view for his.

I think that that really disposes of the whole matter of the cross-appeal, and in the result both appeals must be dismissed. The defendant's appeal will be dismissed with costs, and the plaintiff's appeal will be dismissed without costs.

MacKinnon L.J. I agree.

du Parcq L.J. I agree, and only wish to say that the views I have formed in the appeal and cross-appeal have been expressed in the judgment of the Master of the Rolls, with which I desire to express my concurrence.

Cross-appeal dismissed.

Solicitors for the plaintiff: *Lawrance, Messer & Co.*

H. C. G.

YELLAND AND OTHERS *v.* POWELL DUFFRYN ASSOCIATED COLLIERIES, LIMITED (No. 2).

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Negligence—Fatal accident—Damages—Measure—Claims under both Fatal Accidents Acts and Law Reform (Miscellaneous Provisions) Act, 1934—*Award under Act of* 1934—*Fatal Accidents Acts,* 1846 *to* 1908—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1, *sub-s.* 5.

Sect. 1, sub-s. 5, of the Law Reform (Miscellaneous Provisions) Act, 1934, provides: "The rights conferred by this Act for the "benefit of the estates of deceased persons shall be in addition "to and not in derogation of any rights conferred on the dependants "of deceased persons by the Fatal Accidents Acts . . . ." The "rights conferred . . . by the Fatal Accidents Acts," which are preserved by this sub-section, are those of a personal representative to claim damages on behalf of the dependants under the Fatal Accidents Acts, and, whatever pecuniary advantage has resulted to them as the result of an award of damages under the Act of 1934, to recover any balance of loss which it can be proved that they have sustained. The effect of the sub-section is not that a sum recovered under the Act of 1934 shall not be taken into account in assessing damages under the Fatal Accidents Acts. It is, therefore, right, in assessing damages under the Fatal Accidents Acts, to take into consideration any beneficial interest derived by a dependant from the estate of the deceased by reason of its increase by an award of damages to the legal personal representative of the deceased under the Act of 1934.

Decision of Lewis J. affirmed.

Cross Appeals by plaintiffs from Lewis J., sitting without a jury at Cardiff Assizes.

On September 6, 1938, an explosion occurred at a colliery belonging to the defendants, Powell Duffryn Associated Collieries, Ld., and four miners were killed, among them being David John Yelland, Daniel Davies, and John Sydney Williams. Actions were brought claiming damages from the defendants under the Law Reform (Miscellaneous Provisions) Act, 1934, by Sarah Ann Yelland, mother and administratrix of Yelland; Doris Davies, widow and administratrix of Davies; and Margaret Williams, widow and administratrix of Williams. Mrs. Yelland was awarded 650*l.*; Mrs. Davies 700*l.*; and Mrs. Williams, 250*l.* Mrs. Davies and Mrs. Williams also claimed damages under the Fatal Accidents Acts, each being awarded 5*l.*, while their infant children were awarded sums ranging from 50*l*. to 150*l*. Lewis J., in assessing the damages payable to the two widows under the Fatal Accidents Acts, took the view that the widow in each case would benefit to the full extent by the amount awarded to her under the Act of 1934, and he, therefore, took into account the amount awarded under the Act of 1934 and pro tanto reduced the amount awarded under the Fatal Accidents Acts. The defendants having appealed (1), the plaintiffs, Mrs. Davies and Mrs. Williams, cross appealed on the ground that the amounts of the damages awarded to them under the Fatal Accidents Acts ought not to have been so reduced. They also cross appealed on the ground that the amounts awarded under the Fatal Accidents Acts were in any case inadequate. The arguments and judgments on this latter point are omitted.

The cross-appeals were heard on January 14, 15, 1941.

Paull K.C. and *Griffith Williams* for the plaintiffs. The practice which has sprung up in cases where the dependants on whose behalf a claim is brought under the Fatal Accidents Acts are the same persons as the beneficiaries of the estate of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, of taking into account the amount of damages awarded under the Act of 1934 when assessing the damages under the Fatal Accidents Acts is clearly erroneous. The plaintiffs are entitled to recover the full amount for which they prove under both Acts. That appears plainly from the wording of s. 1, sub-s. 5, of the Act of 1934 which provides that the rights conferred by that Act "shall be in addition to "and not in derogation of" rights conferred by the Fatal Accidents Acts (2). To derogate means to "take away or "detract from, diminish, disparage": Murray's Oxford Dictionary. *Rose* v. *Ford* (3) is an authority in favour of this submission, for there the House of Lords directed judgment to be entered for the full amount of the 300*l*. damages awarded by Humphreys J. under the Fatal Accidents Acts as well as the 1000*l*. to which the House found that the plaintiff was entitled under the Act of 1934, and both Lord Wright and Lord Roche said that that award led to no improper duplication of damages (1). A widow might prosecute her claims under the two statutes in separate actions, as in *May* v. *Sir Robert McAlpine & Sons* (*London*), *Ld.* (2), or the deceased might have appointed an executor by will who would bring the action under the Act of 1934 while the widow might be the plaintiff in an action under the Fatal Accidents Acts. In such cases it would not be possible to take into consideration the damages awarded under the one Act when assessing those under the other. It is true that views contrary to the present submission appear to have been expressed by MacKinnon L.J. and Goddard L.J. in *Ellis* v. *Raine* (3), but those dicta were obiter, and, it is submitted, incorrect and not binding on this court. True, also, in *Rose* v. *Ford* (4) Lord Atkin said that "if those who benefit under the [Fatal "Accidents Acts] also benefit under the will or intestacy of the "deceased personally, their damages under those Acts will be "affected," but Lord Atkin was there dealing with the position which would arise if a claim were made under the Act of 1934 for loss of future earnings as well as a claim for loss of expectation of life. That also explains Lord Wright's observation (5) that, in a case under the Act of 1934, "the jury would be properly "directed to take into account either that they were at the "same time giving damages under Lord Campbell's Act . . . . "or that such damages had been or might be given." In *Rose* v. *Ford* (6), therefore, the award of two sets of damages in full under the two Acts was approved in a case such as the present where the only claim under the Act of 1934 is for loss of expectation of life and the compensation sought for loss of earnings is confined to a claim under the Fatal Accidents

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(1) The appeal was dismissed, see p. 154 ante.

(2) By Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, sub-s. 5: "The rights con-"ferred by this Act for the "benefit of the estates of deceased "persons shall be in addition to "and not in derogation of any "rights conferred on the depend-"ants of deceased persons by the "Fatal Accidents Acts, 1846 to "1908 . . . ."

(3) [1937] A. C. 826.

(1) [1937] A. C. 853, 862.
(2) (1938) 54 Times L. R. 850.
(3) [1939] 2 K. B. 180, 184, 185.
(4) [1937] A. C. 826, 835.
(5) Ibid. 852, 853.
(6) Ibid. 826.

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Acts, and the observations of Lord Atkin and Lord Wright already dealt with were merely directed to what would have been the position if that had been otherwise.

[*Hicks* v. *Newport, Abergavenny & Hereford Ry. Co.* (1); *Grand Trunk Ry. Co. of Canada* v. *Jennings* (2); *Baker* v. *Dalgleish Steam Shipping Co.* (3); *The Aizkarai Mendi* (4); were also referred to.]

Comyns Carr K.C., *Joshua Davies K.C.*, and *Rowe Harding* for the defendants. It is too late now to raise this question in view of the opinions expressed by the majority of the Court in *Ellis* v. *Raine* (5) and what was said by the members of the House of Lords in *Rose* v. *Ford* (6). The practice is too well settled to be altered. In *Ellis* v. *Raine* (5) both MacKinnon L.J. and Goddard L.J. expressed the view that, where the dependants who claim under the Fatal Accidents Acts are the same persons as the beneficiaries of the estate of the deceased who claim under the Act of 1934, any damages recovered under the latter Act may diminish, or even extinguish, the claim under the Fatal Accidents Acts, since the claimants must not be allowed to have their damages twice over to any extent. In *Rose* v. *Ford* Lord Atkin (7), Lord Wright (8), and Lord Roche (9) expressed opinions which were to the same effect, and it is to be borne in mind that the House had no appeal before it regarding the award to the plaintiff of 300*l*. damages under the Fatal Accidents Acts, and, therefore, they must not be taken specifically to have approved it. Sect. 1, sub-s. 5, of the Act of 1934 does not have the effect which is contended for. Sect. 40 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, provides: "In assessing damages in any action under "the Fatal Accidents Acts, 1846 to 1908 . . . . there shall not be "taken into account any widows' pension, additional allowance "or orphans' pension payable under this Act." Contrast those clear words "shall not be taken into account" with

(1) (1857) 4 B. & S. 403*n*.
(2) (1888) 13 App. Cas. 800, 803.
(3) [1922] 1 K. B. 361.
(4) [1938] P. 263.
(5) [1939] 2 K. B. 184, 185.
(6) [1937] A. C. 826.
(7) Ibid. 835.
(8) Ibid. 852, 853.
(9) Ibid. 862.

the words of s. 1, sub-s. 5, of the Act of 1934, which, it is submitted, refer to the right to damages and not to the amount of an award of damages, for the word "derogation," while correctly used regarding a right, is totally inappropriate with reference to a monetary amount. No one would say "in "derogation of 1000*l*." when he meant "in diminution of" that sum. The sub-section was, no doubt, enacted to prevent its being thought that the effect of the Act of 1934 was to take away or detract from a dependant's right to a proper amount of damages under the Fatal Accidents Acts.

[*Pym* v. *Great Northern Ry. Co.* (1) and *Avery* v. *London and North Eastern Ry. Co.* (2) were also referred to.]

Cur. adv. vult.

1941. Feb. 12. The following judgments were read.

MACKINNON L.J. We dismissed the appeal of the defendants in this case some time ago, and affirmed the learned judge in holding that the defendants were liable to pay damages to the plaintiffs. These are the cross-appeals of two of the plaintiffs who allege that the damages awarded by the judge have been awarded on an erroneous basis. The claim was for damages both under the Fatal Accidents Act, 1846, and also under the Law Reform (Miscellaneous Provisions) Act, 1934. The judge has assessed damages under each, but in assessing them under the Act of 1846 he has taken account of the benefit which one of the dependants (in each case the widow) is to derive under the Act of 1934 and has pro tanto reduced the damages under the Act of 1846. Mr. Paull contends that that is erroneous, and that by virtue of a provision in the Act of 1934 no such reduction ought to be made.

Under the Fatal Accidents Act, 1846, commonly called Lord Campbell's Act, an action can be brought by the personal representative of a deceased person against the defendant responsible for his death to recover the pecuniary loss resulting from his death to his wife or other dependants. It is well

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(1) (1863) 4 B. & S. 396.

(2) [1938] A. C. 606.

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settled that that loss is strictly limited to pecuniary injury from the death. If, for example, the deceased was childless and supported his wife from his income from investments, and if by his will he left all he possessed to the wife, she clearly would have no claim under the Act of 1846. Similarly, until the amendment by the Fatal Accidents (Damages) Act, 1908, if a widow dependant got the benefit of a policy of life or accident insurance, that was a benefit to be taken into account in estimating what was her claim for pecuniary loss by the husband's death under the Act of 1846. If a sum recoverable under the Act of 1934 belongs beneficially to the widow, it would seem clear that this sum ought to be taken into account in estimating, under the Act of 1846, what has been her pecuniary loss as a dependant by the husband's death.

This is what the judge has done, and Mr. Paull says he ought not to have done. That contention depends solely on the provision in s. 1, sub-s. 5, of the Act of 1934: "The rights "conferred by this Act for the benefit of the estates of deceased "persons shall be in addition to and not in derogation of any "rights conferred on the dependants of deceased persons by "the Fatal Accidents Acts." In fact, in this case each widow has claimed under both Acts, and has been given damages under both Acts. Therefore, her claim under the Act of 1934 has been allowed in addition to her claim under the Act of 1846, and has not been allowed to derogate from her right to claim under the Act of 1846. But Mr. Paull says that the words "in addition to and not in derogation of any "rights" under the Act of 1846 mean that anything recovered under the 1934 Act shall not be allowed to diminish the full amount of damages that would be recoverable under the 1846 Act if the Act of 1934 had never been passed. I think that this argument is unsound. The sub-section refers to "any rights" under the Act of 1846. Those "rights" seem to be only the right of a personal representative to claim damages. The sub-section says nothing about the measure of damages so recoverable. If the Legislature had meant to enact that the amount of damages under the 1846 Act should not be affected by anything recovered under the 1934 Act, they had the very pertinent precedent of the Fatal Accidents (Damages) Act, 1908. That simply and clearly says: "In assessing damages in any action . . . . under the Fatal Accidents Act, 1846, ... there shall not be taken into "account any sum paid or payable on the death of the deceased "under any contract of assurance or insurance." I think it is impossible to hold that the words: "The rights conferred "by this Act . . . . shall be in addition to and not in derogation "of any rights conferred . . . . by the Fatal Accidents Acts" are equivalent to: "In assessing damages under the Fatal "Accidents Acts any sum recovered under this Act shall "not be taken into account." The truth is, as far as I can see, that "and not in derogation of" means nothing more than "shall be in addition to." I have no idea why Parliament, or the draftsman, indulged in this unnecessary tautology, but I am quite satisfied that "not in derogation of" cannot bear the meaning suggested for the plaintiffs. Therefore, these cross-appeals fail.

LUXMOORE L.J. [after stating the facts:] Lewis J., in fixing the damages in the case of Davies, said: "I have to "bear in mind that Mrs. Davies is not entitled to damages "twice over. She is an administratrix, and she, as administratrix and by virtue of the provisions of the Law Reform "Act, became entitled by her husband's death to such sum as "the Court may say is the amount of the value of his expectation "of life. Therefore, she is not entitled to the same amount "under the Fatal Accidents Act as she would have been if "she had not benefited by virtue of the Law Reform (Miscellaneous Provisions) Act. I think the sum to award her "under the Fatal Accidents Act is the sum of 5*l*. . . . . I will "also award the widow 700*l*. under the Law Reform (Miscellaneous Provisions) Act." In fixing the damages in the case of Williams, Lewis J. said: "Again, in this case, "the same remarks apply with regard to the recovery of "damages by the widow as administratrix. She gets an "amount awarded to the estate under the Law Reform

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"(Miscellaneous Provisions) Act. With regard to this case, I "think the proper amount to award the widow under the Fatal "Accidents Act is 5*l*. . . . . In addition to that, the estate is "entitled to . . . . 250*l*. for the loss of expectation of life."

It will be observed that in each case the damages awarded to the widow of the deceased man under the Fatal Accidents Acts is stated by the learned judge to be 5*l*., but he has made it clear that in the case of Davies the total amount he would have awarded to the widow under that Act, had it not been for his award under the Law Reform Act, would have been 705*l*., and that in the case of Williams he would have awarded to the widow 255*l*., had it not been for his award under the Law Reform Act. In the case of Davies the judge awarded the sum of 700*l*. for loss of expectation of life under the Law Reform Act, and in the case of Williams, the sum of 250*l*. He has in each case taken the whole amount awarded under the Law Reform Act into consideration when fixing the amounts to be paid to the widows under the Fatal Accidents Acts on the basis that the widows will benefit to the full extent by the amounts awarded under the Law Reform Act. Mr. Paull, on behalf of the plaintiffs, contended that the amounts awarded under the Fatal Accidents Acts are wholly insufficient. No appeal is made in respect of the amounts awarded under the Law Reform Act, and, therefore, the sum of 700*l*. awarded to Davies' estate and the 250*l*. awarded to Williams' estate must be taken as correct.

The Fatal Accidents Act, 1846, provides that whenever "the death of a person shall be caused by wrongful act, "neglect, or default, and the act, neglect, or default is such "as would (if death had not ensued) have entitled the party "injured to maintain an action and recover damages in respect "thereof, then and in every such case the person who would "have been liable if death had not ensued shall be liable to an "action for damages, notwithstanding the death of the person "injured, and although the death shall have been caused under "such circumstances as amount in law to felony." By s. 2 of the Act it is provided: "Every such action shall be for the "benefit of the wife, husband, parent, and child of the person "whose death shall have been so caused, and shall be brought "by and in the name of the executor or administrator of the "person deceased; and in every such action the jury may give "such damages as they may think proportioned to the injury "resulting from such death to the parties respectively for "whom and for whose benefit such action shall be brought; "and the amount so recovered, after deducting the costs not "recovered from the defendant, shall be divided amongst the "before-mentioned parties in such shares as the jury by their "verdict shall find and direct." It appears to be plain from these provisions that the legal personal representative of the deceased person was given a new statutory right of action against the person liable, and that that right does not enure for the benefit of the estate of the deceased person, but for the benefit of the dependants. Sect. 2 suggests that the damages should be assessed as one lump sum and that the lump sum so assessed should be divided into appropriate parts by the jury, but it is, I think, well settled that the right conferred by the statute to recover damages is restricted to the actual pecuniary loss sustained by each individual within the limits laid down: *Pym* v. *Great Northern Ry. Co.* (1), and *Grand Trunk Ry. Co. of Canada* v. *Jennings* (2); and I see no objection to considering the case of each dependant separately in the first instance, for by so doing the lump sum is ascertained and apportioned although the apportionment is made as a preliminary to the ascertainment of the lump sum. In substance, Lewis J. has said in the case of Davies that, if the widow had obtained no benefit under the Law Reform Act, the amount he would have awarded would have been a lump sum of 955*l*., and that he would have apportioned this between the widow and the two infant children in the following shares, namely, 705*l*. to the widow, 100*l*. to the girl, and 150*l*. to the boy, but he has reduced this amount to 255*l*. because the widow is to benefit by reason of the award of 700*l*. in favour of Davies' estate on the footing that the whole of that sum passes to her on her husband's intestacy, and he has, therefore, reduced the lump sum from 955*l*. to 255*l*. by deducting from the widow's

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(1) 4 B. & S. 396, 407.

(2) 13 App. Cas. 800, 803.

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individual loss under the Fatal Accidents Acts the whole of the 700*l.*

There can be no question that, apart from any statutory provision to the contrary, the damages to be awarded under the Fatal Accidents Acts are to be ascertained with due regard to any benefits accruing to the persons entitled to participate in them by reason of the death which gives rise to the right to such damages: see the summing-up to the jury by Lord Campbell in *Hicks* v. *Newport, Abergavenny and Hereford Ry. Co.* (1). It was on this ground that before the passing of the Fatal Accidents (Damages) Act, 1908, the Court directed juries when assessing damages under the Fatal Accidents Act, 1846, to take into account benefits derived by dependants from insurance policies effected by the deceased. By the Act of 1908 those benefits were expressly excluded from consideration in such an assessment, for it provided that "in "assessing damages in any action, whether commenced before "or after the passing of this Act, under the Fatal Accidents "Act, 1846, as amended by any subsequent enactment, there "shall not be taken into account any sum paid or payable on "the death of the deceased under any contract of assurance or "insurance, whether made before or after the passing of this "Act."

It was argued by Mr. Paull in the present cases that a further statutory exception has been introduced by s. 1, sub-s. 5, of the Law Reform Act. The question whether this sub-section does in fact create a further statutory exception to the matters to be taken into consideration in assessing damages under the Fatal Accidents Acts does not appear to have been argued in any reported case. In *Feay* v. *Barnwell* (2) Singleton J., without argument on the point, reduced the amount of damages which he would have awarded to a widow under the Fatal Accidents Acts if she had taken no benefit by reason of her participation in damages to be awarded under the Law Reform Act to 50*l.* by taking into account the sum of 575*l.*, the amount by which the learned judge held the widow benefited in a sum of 625*l.* awarded to the deceased man's estate under the Law Reform Act. In so doing, Singleton J. purported to follow the dicta of Lord Atkin and Lord Wright in *Rose* v. *Ford* (1). Lord Atkin, in his speech in that case, said (2): "I should add that I see no difficulty as to the "alleged duplication of damages under the Act of 1934" (that is the Law Reform Act) "and the Fatal Accidents Acts. "If those who benefit under the last-mentioned Acts also "benefit under the will or intestacy of the deceased personally, "their damages under those Acts will be affected. If they do "not, there seems no reason why an increase to the deceased's "estate in which they take no share should affect the measure "of damages to which they are entitled under the Act" (that is the Fatal Accidents Acts). Lord Wright said (3): "It is "said that, if this element of damage is allowed," (that is, damage for loss of expectation of life), "there may be a risk "of duplication of damages in particular because the Act of "1934 by s. 1, sub-s. 5, provides that the rights conferred by "the Act shall be in addition to, and not in derogation of, "rights conferred on dependants by the Fatal Accidents Act "or other like Acts. If the Act necessarily involved this "consequence, it would all the same have to be enforced. But "in my opinion the Act" (that is the Law Reform Act) "does "not. I think that in practice no duplication of damage need "occur. I think the jury would be properly directed to take "into account either that they were at the same time giving "damages under Lord Campbell's Act as they did here, or "that such damages had been or might be given. The object "of damages in these cases is compensation for the benefit of "the estate. It is true that the claims under Lord Campbell's "Act are independent and are for the separate pecuniary loss "sustained by the dependants, whereas the damages under the "Act of 1934 go into the general estate in which quite different "persons, creditors, legatees, or other beneficiaries, may be "interested. But one of the fruits of continued life is generally "provision for dependants. If that provision is made good by "awards under the Fatal Accidents Acts, the loss consequent

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(1) 4 B. & S 403*n.*

(2) [1938] 1 All E. R. 31.

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(1) [1937] A. C. 826.
(2) Ibid. 835.
(3) Ibid. 852.

"on the shortening of life may be deemed to be pro tanto "reduced. The award of damages in the present case shows how "duplication may be avoided."

It is difficult to understand the precise meaning of this last sentence. As Mr. Paull pointed out, the award of damages under the Fatal Accidents Acts was made by the judge at the trial without reference to any claim under the Law Reform Act, for that claim was wholly rejected by him. The award of 1000*l.* by the Court of Appeal by way of damages under the Law Reform Act was not arrived at after taking into account the 300*l.* awarded by the judge under the Fatal Accidents Acts, nor was the 300*l.* awarded under those Acts wiped out or reduced by reason of the widow's interest in the 1,000*l.* awarded to the deceased's estate. It would appear plain that the duplication, which was said by Lord Wright to have been avoided by the award of damages in *Rose* v. *Ford* (1), was not in fact avoided. There is no reference in the report to arguments of counsel in *Rose* v. *Ford* (1) to any such point, nor is it referred to by the members of the House other than Lord Atkin and Lord Wright. In these circumstances, I think that this Court is bound to treat the point as open for its consideration.

The only ground on which any interest taken by a dependant in the estate of the deceased can be ignored in assessing the damage suffered by him or her under the Fatal Accidents Acts is that such interest is excepted by statute from consideration as, for example, the interest in the deceased's life insurance policies. The question to be answered is, therefore: Is there any such statutory exception in the present case? Mr. Paull argued that such an exception was to be found in the express words of s. 1, sub-s. 5, of the Law Reform Act. The words relied on are: "The rights conferred by this Act for the benefit "of the estates of deceased persons shall be in addition to and "not in derogation of any rights conferred on the dependants "of deceased persons by the Fatal Accidents Acts, 1846 "to 1908." The important words are: "The rights conferred "by this Act." Whatever such rights may be, it is plain that the Act does not confer any rights in respect of damages for loss of expectation of life on any person other than the legal personal representative of the deceased as representing the deceased person's estate and for the benefit of that estate. A person who is entitled to any beneficial interest in the estate of the deceased, whether by reason of the testamentary dispositions of the deceased or as the result of the application of the law with regard to intestate succession, does not get any right under the Law Reform Act. His or her interest in the estate must necessarily arise outside the Law Reform Act and depends on the application of the law with regard to administration of estates as well as the law relating to testate or intestate succession. If a dependant takes a beneficial interest in the estate of a deceased person which has been increased by reason of the award of damages under the Law Reform Act, the taking into account of that beneficial interest in assessing the damage suffered by that dependant under the Fatal Accidents Acts cannot be said to affect injuriously the rights of that dependant under those Acts. His or her rights under the Fatal Accidents Acts remain unimpaired. The rights of the legal personal representative under the Law Reform Act cannot possibly be affected by anything awarded to dependants under the Fatal Accidents Acts, for the damages recoverable by the legal personal representative under the Law Reform Act are limited to the loss to the deceased's estate of the value of his own expectation of life and damages for pain and suffering and pecuniary loss, and they cover nothing else except the funeral expenses. In the case of damages under the Fatal Accidents Acts, the taking into consideration of any interest derived by a dependant from the estate of the deceased does not involve setting off any right under the Law Reform Act against the rights of the dependant under the Fatal Accidents Acts, for, as already pointed out, the dependant as such has no right whatever conferred on him or her by the Law Reform Act.

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(1) [1937] A. C. 826.

For these reasons, I think that Mr. Paull's contention must be rejected and this Court must hold that in assessing damages under the Fatal Accidents Acts it is right to take into consideration any beneficial interest derived by a dependant from the estate of the deceased by reason of its increase by the award of damages to the legal personal representative of the deceased under the Law Reform Act.

The appeals therefore fail and must be dismissed.

du Parcq L.J. The question in this appeal is whether, on the true construction of s. 1, sub-s. 5, of the Law Reform (Miscellaneous Provisions) Act, 1934, the surviving spouse and children of a deceased person are entitled to have damages assessed in their favour under the Fatal Accidents Act, 1846, without regard being paid to any pecuniary gain which has resulted, or is likely to result, to them by reason of the provisions of the first-mentioned Act.

If the contention of the plaintiffs' counsel is correct, it would seem that this important sub-section has either been overlooked or misunderstood both in the House of Lords and in this Court, as well as by, I think, all the judges of the King's Bench Division. It may be added that, if the subsection is to be construed in accordance with the plaintiffs' submission, its provisions cannot be said to be based on any discoverable principle and must lead to manifest injustice. The plaintiffs' counsel may, however, be right when he says that we are not technically bound by any of the previous dicta or decisions of this Court because hitherto the point seems never to have been taken. I will, therefore, shortly state my reasons for thinking that there is no substance in the plaintiffs' contention.

It must often happen that the rights conferred by the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the estates of deceased persons bring pecuniary advantage to dependants who may also benefit under the Fatal Accidents Act, 1846. The Act of 1934 provides, by s. 1, sub-s. 5, that the rights so conferred are to be " in addition to "and not in derogation of " any rights conferred on dependants by the Fatal Accidents Act, 1846. It is, therefore, necessary to consider exactly what are the rights of dependants under the Fatal Accidents Act. Under it certain members of the family of a person whose death was caused by the wrongful act, neglect, or default of another acquired a right to damages by way of compensation if "injury," by which is meant pecuniary loss, had resulted to them from the death. Any members of the family who have suffered no such loss acquire no rights at all under the Act. If they bring an action and prove no loss, actual or prospective, the defendant is entitled to the verdict: see *Duckworth* v. *Johnson* (1). When the jury are considering whether there has been such a loss, and, if so, what damages are "proportioned" to it, they must take into account any pecuniary gain which has resulted from the death, except in those cases in which Parliament has enacted that such a gain is not to be taken into account. It is to be observed that when Parliament has so enacted, namely, in the Fatal Accidents (Damages) Act, 1908, and the Widows,' Orphans' and Old Age Contributory Pensions Act, 1925, it has used clear and unambiguous language which any draftsman wishing to express a like intention would probably think it wise to repeat. No similar words are used in s. 1, sub-s. 5, of the Law Reform (Miscellaneous Provisions) Act, 1934, and I cannot construe the sub-section as a direction that benefits which come to a dependant by reason of the Law Reform Act are to be left out of account, either for the purpose of ascertaining whether any right to damages exists or for the purpose of computing such damages. The only effect of the sub-section, in my opinion, is to make it clear that, whatever pecuniary advantage may result to a dependant through the Law Reform Act, he remains entitled to damages under the Fatal Accidents Acts if he is still in a position to prove a balance of pecuniary loss.

It is said that if this is all that the sub-section means it is superfluous. Such an argument is never very convincing, because caution, which sometimes seems to be superabundant, is a familiar, and perhaps a necessary, part of the equipment of the parliamentary draftsman. In the present instance it is, I think, possible to find a sufficient reason for the draftsman's caution. He may well have thought that, in the absence

(1) (1859) 4 H. & N. 653.

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of express provision, it would be an arguable proposition that when damages to which the deceased would have been entitled had he lived had been recovered by his estate, there could be no further right to damages for the defendant's negligence. Some support for that proposition might have been found in the language used by the judges of the Divisional Court in *Griffiths* v. *Dudley (Earl)*, where Field J. said (1): "*Read* v. *Great Eastern Ry. Co.* (2) is a clear decision "that Lord Campbell's Act did not give any new cause of "action, but only substituted the right of the representative "to sue in the place of the right which the deceased himself "would have had if he had survived," and Cave J. expressed a similar opinion (3). These dicta of the Divisional Court seem to have resulted from a misunderstanding of *Read* v. *Great Eastern Ry. Co.* (2), as was pointed out by Lord Dunedin, stating the opinion of the Privy Council in *British [Columbia] Electric Ry. Co.* v. *Gentile* (4), but the draftsman is not to be blamed for regarding them as a warning that, unless the words of the new Act put the matter beyond doubt, a judgment under it might be regarded as extinguishing all rights under the Fatal Accidents Act. However this may be, the meaning of the sub-section, whether it was necessary or not, seems to me to be plain.

The plaintiffs' counsel supported his argument by indicating some of the difficulties which must confront the Courts if his contention did not prevail. These difficulties, which I think seldom arise in practice, are not a novel product of this recent legislation. There were always some causes of action which did not die with the aggrieved person and ever since 1846 the danger has existed that a jury might be faced with the difficult duty of assessing the damages proportioned to a dependant's loss with due regard to the probable result of a pending, or possible future, action from which the dependants might benefit. If the juries of the nineteenth century were equal to the task, I know no reason why their modern successors, or judges performing the same functions, should be less successful. For these reasons I have no doubt that on the question of construction these appeals fail.

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(1) (1882) 9 Q. B. D. 357, 363.
(2) (1868) L. R. 3 Q. B. 555.
(3) 9 Q. B. D. 365.
(4) [1914] A. C. 1034, 1041.

Appeals dismissed.

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(No. 2).

Solicitors for plaintiffs: *Russell Jones & Co., for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Furniss, Wells & Co., for A. J. Prosser, Cardiff.*

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Husband and wife—Separation agreement—Provision for maintenance—Subsequent decree of nullity for wife's incapacity—Effect on agreement.

A separation agreement was executed whereby the husband agreed to pay the wife 1*l.* a week maintenance during their joint lives. Subsequently the husband obtained a decree of nullity on the ground of the wife's incapacity, and ceased to pay the 1*l.* a week alleging that the decree had rendered the marriage null and void ab initio, and consequently had destroyed the basis of the agreement.

Held, first, that the decree did not invalidate the agreement, and, secondly, that as it had not been shown that the parties must have intended that the agreement should cease to operate on a decree of nullity being pronounced, a stipulation to that effect could not be read into it. The agreement to pay the 1*l.* a week was therefore enforceable according to the terms of the agreement.

APPEAL from Shoreditch County Court.

The appellant, Ernest Adams, and the respondent, Kathleen Adams, were married in 1936. On October 11, 1937, a separation agreement in usual form was entered into, and the parties ceased to live together. The husband thereby agreed to pay his wife 1*l.* a week as maintenance during their joint lives. Subsequently, on March 11, 1940, the husband obtained a decree of nullity on the ground of the wife's incapacity to consummate the marriage, and he ceased to pay the 1*l.* a week contending that the marriage was the basis of the agreement, that the decree had declared the marriage null and void ab initio, and that, consequently, there had never been any marriage at all. The wife sued him for arrears of payment, and the county court judge gave judgment in her favour.

The husband appealed. The appeal was heard on January 27, 28, 29, 1941.

Valentine Holmes for the appellant. The county court judge was wrong. The separation agreement was subject to the implied condition that a marriage existed between the parties at the time it was executed. But when the decree of nullity was made absolute the marriage was rendered void ab initio

(*Newbould* v. *Attorney-General* (1)), so that no marriage existed at the time of the execution of the agreement. The appellant ceased to be liable after the date of the decree: *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (2), and *P.* v. *P.* (3). It is true that transactions completed before the decree will not be disturbed (*P.* v. *P.* (3)), so that the appellant would have no claim to repayment of the sums paid to the respondent under the agreement before the decree. [He also referred to *Dormer* v. *Ward* (4).] Technically the agreement, regarded as a marriage settlement, ceased to exist, although the Court under s. 192 of the Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), may vary it. The whole basis of the agreement, namely, the marriage, ceased to exist: *In re Wombwell's Settlement* (5). The appellant covenanted to pay to his "wife" and the Court has declared that she never was his wife. This is not the same case as a divorce, for there the marriage subsists up to the time of the decree: *May* v. *May* (6). Even if originally valid, there was an implication in the agreement that it should only be binding "so long "as you are my wife."

[Clauson L.J. referred to *Charlesworth* v. *Holt* (7).]

That case does not touch the point whether the agreement continued to exist after the decree. The doctrine of frustration applies or is analogous. *Fowke* v. *Fowke* (8) is against the appellant, but in that case the question of frustration was not dealt with, nor were the cases on nullity fully cited. That case was wrongly decided and should be overruled.

[*Law* v. *Harragin* (9) and *Galloway* v. *Galloway* (10) were also referred to.]

Seuffert (*Granville Sharp* with him) for the respondent. There is no doubt, and indeed it is admitted, that payments under the agreement made before the decree cannot be reclaimed: *Dodsworth* v. *Dale* (11). But that involves the

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(1) [1931] P. 75.
(2) [1926] A. C. 497.
(3) [1916] 2 I. R. 400.
(4) [1901] P. 20.
(5) [1922] 2 Ch. 298.
(6) [1929] 2 K. B. 386.
(7) (1873) L. R. 9 Ex. 38.
(8) [1938] Ch. 774.
(9) (1917) 33 Times L. R. 381; [1917] W. N. 193.
(10) [1914] 30 Times L. R. 531.
(11) [1936] 2 K. B. 503, 518-9.

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admission that until the decree the marriage was only voidable: *Turner* v. *Thompson* (1).

[CLAUSON L.J. On the facts of that case the wife had a domicil in the United States whether she was married or not.]

But the intention was inevitably mixed up with the belief that the marriage subsisted.

There was no frustration. In order to imply a term into the agreement that it was based on the continued existence of the marriage one must be able to say that the parties must have so intended: Lord Loreburn in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2), quoted by Scrutton L.J. in *May* v. *May* (3). But here the whole object of the parties was to destroy the relation of husband and wife, and the decree really supplemented the agreement. It does not necessarily follow from the making of the agreement that the parties intended that the continued existence of the marriage should be the basis of the agreement, per Scrutton L.J. in *May* v. *May* (4). The husband might by express words have limited his liability to the period of the marriage: *Charlesworth* v. *Holt* (5).

[CLAUSON L.J. referred to *Hyman* v. *Hyman* (6).]

Holmes in reply. The old ecclesiastical doctrine that a nullified marriage has never existed at all has never been altered by statute or otherwise. It must be accepted that a separation agreement may survive a divorce, but in that case a valid marriage exists at the time the agreement is made. *Dormer* v. *Ward* (7) makes it clear that this agreement ceased to exist at least when the decree was pronounced. But in fact it is exactly on the same footing as if the marriage had been bigamous.

[CLAUSON L.J. It seems to me that the last word on this subject was said by Lord Atkin in *Hyman* v. *Hyman* (6).]

Cur. adv. vult.

1941. Feb. 24. The following judgments were read.

(1) (1888) 13 P. D. 37.
(2) [1916] 2 A. C. 397, 403.
(3) [1929] 2 K. B. 386, 393.
(4) Ibid. 394.
(5) L. R. 9 Ex. 38, 40.
(6) [1929] A. C. 601, 627.
(7) [1901] P. 20.

SCOTT L.J. This county court appeal from His Honour Judge Engelbach raises a question of some importance, as to the effect of a decree absolute of nullity in the Divorce Court upon an agreement for separation made between the appellant as husband and the respondent as wife. The order below was for payment by the husband to the wife of 7*l.* arrears of weekly payments, at the rate of 1*l.* a week due under the agreement, with costs. The appellant, a sergeant in the police force, who appeared in person below, there contended that the decree had discharged the separation agreement: but the learned judge rejected that contention.

The marriage took place on April 11, 1936. The separation agreement was executed by the husband on October 11, 1937. The husband's petition for a decree of nullity was lodged on July 15, 1938. The case was not defended, and a decree nisi was made on March 11, 1940, on the ground of the incapacity of the respondent to consummate the marriage. It was followed by a decree absolute on September 23, 1940. There was nothing unusual in the separation agreement. It recited unhappy differences and a mutual agreement to live apart: that the husband had agreed to pay to the wife "1*l.* a week "for and towards her maintenance and support during the "joint lives of himself and the wife (subject nevertheless as "is hereinafter mentioned) during the continuance of these "presents and so long as the wife shall remain chaste and "shall observe and perform the agreements and stipulations "herein contained and on her part to be performed"; and contained (1.) permission to the wife to live separate and apart and free from his marital control, without interference from him; (2.) a mutual non-molestation clause; (3.) a dum casta promise by the husband to pay the 1*l.* a week "during "the continuance of these presents"; (4.) leave to the wife to keep her clothes, etc.; (5.) an undertaking by the wife to indemnify the husband against her debts; (6.) leave to the husband to deduct from her weekly payments any debts of hers which he might be called upon to discharge.

Before us Mr. Valentine Holmes, for the appellant, in substance submitted two contentions. (1.) He laid stress on the ecclesiastical history of the decree of nullity; pointing out that the remedy was invented by the Church which, holding marriage to be indissoluble, could not grant divorce and instead granted a declaration that there never had been a marriage; that our law adopted the law of the Church; that the effect of the decree of nullity is to avoid a marriage ab initio; and that that effect distinguishes the decree of nullity from a decree of divorce; and, he argued, accordingly, that the appellant's separation agreement was discharged by act of law. (2.) He contended, alternatively, that the contractual basis of the agreement was the existence of the marriage relationship; and that as by the retrospective operation of law there was at that date no marriage in existence, the basis had disappeared and with it the contract which rested on it. He did not quite submit that the doctrine of frustration applied, though he did use that doctrine by way of analogy. Whilst not purporting to attack the principles of interpretation expressed by the Court in *Charlesworth* v. *Holt* (1), about the separation agreement before that Court, he did submit that the terms of the agreement before us, properly interpreted, disclosed an intention that it should only apply if and so far as the status of marriage attached to the parties; although he concurred that completed acts under it, such as past weekly payments, could not be reopened. The ground of distinction he sought to draw was again the difference between a decree of nullity and a divorce.

I am not convinced by these arguments; but before stating my reasons for dismissing the appeal, I wish to dispose of any notion that a hardship must necessarily result from a decision that the decree of nullity left the appellant bound by the agreement of separation. On the decree absolute either party could then have applied to the Court to vary its terms, treating it as a post-nuptial settlement within s. 192 of the Judicature Act, 1925. And even now there is no statutory bar to the appellant making an application by the leave of the judge under r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1937, and in the circumstances of the case the judge might perhaps so exercise his discretion, in spite of the delay.

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(1) L. R. 9 Ex. 38.

Before discussing the interpretation of the separation agreement, upon which, in my opinion, the appeal really turns, it is desirable to clear the ground on two points. In the first place, no impossibility supervened, either in fact or in law, to prevent performance by the appellant of his promise to pay the respondent 1*l*. a week. If he was by the decree relieved of that obligation, it was on some other ground. In the second place, until the decree absolute, the status of husband and wife continued to attach to the appellant and respondent: and although from the time when he first discovered her incapacity to consummate, he possessed a legal right to have the marriage annulled, it remained in law an effective marriage until he obtained his decree. Some confusion has been caused in legal discussion upon the difference between a decree of nullity and a decree of divorce, in regard to their retrospective effects upon the pre-existing marriage, by the use of the words "void" and "voidable." It has been said that in the case of divorce it is good law to speak of the marriage as having been voidable, but not so in the case of nullity; for there the decree pronounces the marriage to have been "void" from the outset. Primarily the use of those two words is a metaphor from the law of contract, and is not truly appropriate to the law of status. But the use of both terms in connection with the status of marriage has received judicial sanction, and is consonant with the ordinary English meaning of the words, although it lends itself to misuse, and may cause confusion. Mr. Holmes was, no doubt, right in his history. Dissolution of marriage being impossible to the Church, original nullity rendering it invalid from the start was the only ground on which the Ecclesiastical Courts could annul a marriage; hence came our own law of nullity and the present form of the decree. But it does not follow from the history of the jurisdiction that after decree of nullity it is legally right to look back and say that the marriage was always and for all purposes void and at no time existed in the eye of the law. That may or may not be true of a bigamous marriage, or where the parties were so related in blood as to fall within the prohibited degrees; but it is not true of a marriage where one spouse is entitled to a decree of nullity on the ground that the other is incapable of consummation. In such a case the marriage is valid for most purposes; not void, but only voidable, as has been said judicially in several cases; for example, by Hannen P. in *Turner* v. *Thompson* (1). Mr. Holmes's concession, that completed acts attributable to the marriage relationship cannot be undone after or as a result of the decree of nullity, really carries the necessary consequence that until decree the marriage is only voidable; and it exposes the fallacy underlying his argument that the separation agreement was never effective in law, because at its date the marriage was to be deemed, by reason of the subsequent decree, to have been non-existing. The legal reality is that in the sense in which the words "voidable" and "void" have been used about marriage in our jurisprudence, the marriage was not then void, but valid, though voidable at the instance of the appellant. It follows that the separation agreement was, when made, a valid act inter partes, and continued such until the decree. If so, I can see no general principle in the law of nullity for differentiating its effects in that respect from the law of divorce. In other words, the separation agreement in the present case was not discharged by act of law.

What defence then is left to the appellant, if he was not discharged from performance either by an act of law or by impossibility of performance? Unless on the true construction of the contract we can find in it a provision, express or implied, that the continuance of the marriage status was to be a condition precedent to the recurrent obligation of payment, the appellant can have no answer to the action of debt for the arrears. I altogether fail to discern the least ground for inferring any such condition. It is no doubt plain from the express terms that both parties, when making the agreement, contemplated the continuance of the marriage: but mere common expectation falls far short of agreement amounting to any such condition. Clause 3 is a "simple" or absolute

(1) 13 P. D. 37, 41.

promise of payment, quite unqualified. A condition could very easily have been inserted in it, had the parties intended it. I can see no ground for implying it. Even if I thought that the parties *may* have intended it, which I do not, that would not suffice. We must be satisfied that they *must* have intended it, if we are to read it in. We cannot say that it is a *necessary* implication, and, therefore, we cannot draw it. The general principle applies: *The Moorcock* (1) ; *Hamlyn & Co.* v. *Wood & Co.* (2).

The truth is that the question of the condition said to be contained by implication in this separation agreement is the very same question as arose in *Charlesworth* v. *Holt* (3), and has arisen in all the cases where the *Charlesworth* v. *Holt* (3) view has been affirmed. I can see nothing in this agreement to differentiate it from the common form of separation agreement ; and, for present purposes, the agreement which was the subject of decision in *May* v. *May* (4) was similar ; and in that case and in *Hyman* v. *Hyman* (5), *Charlesworth* v. *Holt* (3) was approved ; and the implication of any such condition was definitely negatived : see especially per Lord Atkin in *Hyman* v. *Hyman* (6). On the question of discharge of the separation agreement, either by act of law or by an implied condition, when a decision of nullity for physical incapacity is pronounced, those decisions as to the effect of a divorce may not be technically binding on us: but on the question of an implied condition of defeasance, I can see no reason why they should not apply ; and even if I did not hold the opinion that in the separation agreement before us there is no justification for implying such a condition, which I do hold, I should consider myself bound to follow those decisions and expressions of opinion. There is, however, one decision which is directly in point, though not binding upon this Court, that of Farwell J. in *Fowke* v. *Fowke* (7), who there took the same view as I have already expressed of the bearing of a decree of nullity for physical incapacity upon a separation agreement. I agree with his judgment.

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(1) (1889) 14 P. D. 64.
(2) [1891] 2 Q. B. 488.
(3) L. R. 9 Ex. 38.
(4) [1929] 2 K. B. 386.
(5) [1929] A. C. 601.
(6) Ibid. 627.
(7) [1938] Ch. 774.

I think it right to add a few observations on the Irish case of *P.* v. *P.* (1), as Mr. Holmes relied both on the decision and on the reasoning of the judgments. Emphasis was there laid on the language of the decree of nullity, which declared (2) that "the form of marriage . . . . was and is null and void, "and that the petitioner . . . . is free from all bond of "marriage with the said respondent"; but the case is subject to two comments. In the first place the transaction which the Court avoided at the suit of the "wife" had been effected before and in consideration of the intended marriage, which the Court held void by reason of the husband's impotency; it was in the nature of a dowry brought to the intended husband by the intended wife; and in substance was an ante-nuptial settlement. In the second place the Court, whilst in effect restoring to the "wife" the major part of what she had brought in, did not attempt to undo the part of the transaction which had been carried out and completed after the marriage by the husband using it as cash. The decision is no authority on a post-nuptial settlement, as the separation agreement in the present case should in my opinion be regarded: nor is it an authority for the proposition that where the ground of nullity is a party's incapacity to consummate, acts done during a so-called void marriage can be undone by a decree of nullity. For these reasons I think the learned county court judge was right, and that the appeal should be dismissed with costs.

CLAUSON L.J. (read by Goddard L.J.). On October 11, 1937, Ernest Adams agreed with Kathleen Adams, who had been married to him in the year 1936, but was in fact at the date of the agreement living apart from him, to pay to Kathleen 1*l.* a week during their joint lives, so long as she should remain chaste and observe certain stipulations of the character commonly inserted in deeds of separation. On September 23, 1940, a decree absolute was pronounced in a nullity suit brought by Ernest, on the ground of the incapacity of Kathleen to consummate the marriage. The decree declared that the marriage was and always had been null and void.

(1) [1916] 2 I. R. 400. (2) Ibid. 401.

In October, 1937, Kathleen sued for arrears of the 1*l.* a week, partly in respect of weeks preceding the decree, partly in respect of weeks subsequent to the decree. The county court judge gave judgment in favour of Kathleen for the whole of these arrears. In this Court it was not contested that the judgment was correct, in so far as it related to arrears accruing before the date of the decree. It was, however, strenuously contended that the judgment should be reversed in respect of arrears accruing after the decree. His Honour based his judgment on the ground that he ought not to imply into the agreement a term limiting Ernest's obligation to pay the 1*l.* a week to the continuance of the marriage. In my judgment this decision was correct.

Before us much emphasis was placed on the fact that the decree absolute must be treated as having wiped out the marriage altogether: and it was suggested, as I understood, that the basis of the agreement was the assumed present existence, and the contemplated future existence, of a marriage which, in view of the decree, must be taken never to have existed; and it was argued that in consequence the obligation entered into by Ernest was no longer enforceable. It was also suggested that on the true construction of the document, read in light of what must now be taken to be the fact, that the parties, though described as husband and wife, were not husband and wife at the time of the agreement, the document must be treated as limiting Ernest's liability to the period of the marriage. It was also somewhat faintly urged that there was mutual mistake as to the existence of a marriage. In reference to this last point, I will say no more than that this point does not seem to have been suggested to the county court judge, nor indeed do I see how it could have been reasonably suggested to him on behalf of a litigant who (although it is true the county court judge did not believe his story on the point) appears to have alleged in his evidence that, when they in fact separated prior to the execution of the agreement, he and Kathleen had agreed that he should take nullity proceedings based, as it would seem, on her refusal to consummate the marriage. It was also suggested that the doctrine commonly known as "frustration" was of some assistance to the appellant. Frustration must flow from some subsequent event, which in this case must be the establishment of the nullity of the marriage. It was not suggested that this fact nullified the advantages gained by Ernest during the period between the contract and the decree by reason of Kathleen's covenant to indemnify him against his liabilities for her debts, a covenant admittedly operative during that period: nor was it suggested that this fact put any difficulty in the way of Ernest continuing his payments: nor was it suggested that it in any way nullified the advantages accruing to Ernest during the period subsequent to the decree by reason of Kathleen's covenant not to molest him, and so forth. But the event causing the alleged frustration, namely, the making of the decree, was admittedly brought about by Ernest's volition; and could not (against Kathleen's will) have been brought about save by Ernest's volition. It is new to me that a defendant can rely on frustration by reason of an event brought about purely by his own volition.

In truth, the only plausible defence is that, on its true construction, having regard to the circumstances existing at the date of the contract, the document cannot reasonably be construed to place Ernest under a liability to pay except while Kathleen is under coverture. I can see no reason to place any such artificial meaning on the document. The document is quite plain and clear as it stands, and bears a completely intelligible and reasonable meaning if construed literally. If it had been intended that it should have the suggested restricted operation, nothing could have been easier than to insert limiting words. The matter is free from the complication which sometimes arises in cases of the construction of commercial documents, where there is evidence that the parties were contracting by reference to some course of dealing or commercial custom so notorious that they may fairly be supposed to have mutually intended that the contract must be construed in the light of such a reference.

An argument which in principle appears to me to be indistinguishable from that put forward by the appellant was raised in the Court of Exchequer in 1873 in the case of *Charlesworth* v.

Holt (1), on the construction of a similar document, and was rejected, after argument by very distinguished counsel, by a strong bench of that Court. I am of opinion that the like argument was properly rejected by the county court judge and should be rejected by us. If we accepted it, we should in effect be overruling a case which has stood in the books as an authority for many years, and was accepted as correct by this Court in *May* v. *May* (2). In my opinion *Charlesworth* v. *Holt* (1) was decided on a correct principle and its principle is binding upon us and completely justifies the decision of the county court judge.

GODDARD L.J. Unless this case can be distinguished from *May* v. *May* (2), which is binding on this Court, it follows that the judgment of His Honour was right. That case approved the decision in *Charlesworth* v. *Holt* (1) in which a separation deed indistinguishable for present purposes from that which we now have to construe was held to operate not only during the continuance of the married state, but also after the marriage had been dissolved. It was sought to distinguish this case on the ground that here there has been a decree of nullity, which in terms declares that there never had been a valid marriage between the parties. The decree was granted by reason of the incapacity of the wife to consummate the marriage; and it was, therefore, a case of what has always been described as a voidable and not of a void marriage. Such a marriage is good and valid unless and until the assistance of the Court is sought; or, as would have been said before 1857, the office of the judge had been promoted, and a decree obtained. A sentence or decree always has been, and is, as necessary to annul a marriage on this ground as to dissolve it for adultery or cruelty. Until decree the parties have the status of married people, with all the rights and liabilities consequent thereon. The husband is obliged to maintain his wife, and she has the right to pledge his credit for necessaries. While that obligation and that right were subsisting the parties separated; and the husband covenanted to make a periodical payment to his wife during

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(1) L. R. 9 Ex. 38.

(2) [1929] 2 K. B. 386.

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their joint lives, not for the period during which she remained his wife. In my opinion, therefore, the reasoning on which *Charlesworth* v. *Holt* (1) was based exactly applies to the present case. I think it is unnecessary to deal with the case at greater length, because the precise point fell to be decided in *Fowke* v. *Fowke* (2), and I entirely agree with the judgment of Farwell J. in that case, and can add nothing to it. It may, however, be pointed out that if a husband enters into a separation deed in ignorance of the fact that his marriage was void, because, for instance, the marriage was bigamous or the parties were within the prohibited degrees of affinity, and he did not know of the impediment, the deed is void, as was decided in *Law* v. *Harragin* (3), following *Galloway* v. *Galloway* (4). These cases proceed on the ground of mistake: but there can be no mistake where a decree of nullity is obtained on the ground of impotence after a separation, as the petitioning spouse ex hypothesi can have no greater knowledge of the facts when he or she petitions than when they separated.

Appeal dismissed. (5)

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Ludlow & Co.*

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(1) L. R. 9 Ex. 38.

(2) [1938] Ch. 774.

(3) 33 Times L. R. 381.

(4) 30 Times L. R. 531.

(5) The Court adjourned an application by the appellant for leave to appeal to the House of Lords in order that he might have an opportunity of applying to the judge under sec. 192 of the Judicature Act, 1925, to vary the terms of the separation agreement, treating it as a post-nuptial settlement.

W. L. L. B.

BROWNE *v.* DE LUXE CAR SERVICES.

C. A.
1941
Feb. 20, 21.

Local government—Road authority—Tramway company—Taken over by local authority and subsequently abandoned—Obligation to maintain surface of tramway—Neglect of duty—Accident—Liability—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 28.

Where a local authority has taken over a tramway undertaking and has subsequently abandoned the use of that undertaking, the local authority is not relieved of the liability imposed by the Tramways Act, 1870, to repair and maintain that part of the surface of the road on which the tramway is laid.

APPEAL from Stable J.

In 1932 the Birkenhead Corporation discontinued the use of a tramway system which they had taken over from a limited company. On June 27, 1939, a motor car skidded on one of the roads on which the trams had formerly run, with the result that the motor car knocked over three boys who were on bicycles, of whom two were injured and one killed. An adjoining garage was also damaged.

Four consolidated actions were commenced against the owners of the motor car (De Luxe Car Services) and the Birkenhead Corporation, in which damages were claimed, on behalf of the injured parties, against both defendants.

It was alleged (inter alia) against the corporation that, in breach of s. 28 of the Tramways Act, 1870 (1), they failed to maintain or keep in repair so much of the road as lay between the rails of the tramway and the portion of the road between the tramway and so much of the road as extended eighteen inches beyond the rails of and on each side of the tramway.

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(1) Sect. 28 of the Tramways Act, 1870, provides: "The promoters shall, at their own "expense, at all times maintain "and keep in good condition and "repair, with such materials and "in such manner as the road "authority shall direct, and to "their satisfaction, so much of "any road whereon any tramway "belonging to them is laid as lies "between the rails of the tram-"way and (where two tramways "are laid by the same promoters "in any road at a distance of not "more than four feet from each "other) the portion of the road "between the tramways, and in "every case so much of the road as "extends eighteen inches beyond "the rails of and on each side of "any such tramway. If the "promoters abandon their under-"taking, or any part of the same, "and take up any tramway or "any part of any tramway belong-"ing to them, they shall with all "convenient speed . . . . fill in "the ground and make good the "surface, and, to the satisfaction "of the road authority, restore "the portion of the road upon "which such tramway was laid "to as good a condition as that "in which it was before such "tramway was laid thereon . . . ."

It was established by the evidence that the tracks where the metal rails were laid had been filled in with a preparation composed of bitumen, the rails themselves not having been taken away, but left in the ground. It was also established that the surface of the ground was treacherous, because, in the course of time, the granite setts had become highly polished.

Stable J. held that there was no negligence on the part of the driver and that the action failed against the owners of the motor car. He also held that the corporation had abandoned the tramway undertaking in 1932 and that the obligations imposed on them to maintain and keep the roadway in good condition had come to an end ; and that the action failed against the corporation, because, although he was satisfied that the road was not in the condition in which he would have liked to see it, they were under no obligation to make it so.

The plaintiffs appealed. The appeal was heard on February 20, 21, 1941.

E. G. Hemmerde K.C. and *Allister Hamilton* for the appellants. The driver was, on the evidence, guilty of negligence, having regard to the state of the road. The first defendants are, therefore, in view of the driver's negligence, liable as the owners of the motor car.

The corporation are liable, as tramway undertakers, for their failure to carry out their duty, under s. 28 of the Tramways Act, 1870, of maintaining and keeping in good condition and repair the parts of the road on which the tramway system ran. Stable J. held that they had ceased to be liable, having regard to the latter part of s. 28, because they had abandoned the undertaking. But there is no evidence of abandonment except that the trams had ceased to run and the lines had been covered up. It is clear that there was no abandonment of the undertaking, for there would have been nothing to prevent the corporation from uncovering the lines and resuming the running of the trams without obtaining any fresh statutory authority. It is the abandonment of "their undertaking" by the promoters which is contemplated in s. 28, and it should be a corollary of such an abandonment that the lines should be taken up. Here there was a mere suspension of the running of the trams. As to the liability of a tramway company to maintain the part of the road for which they are responsible, see *Dublin United Tramways Co., Ld.* v. *Fitzgerald* (1).

The corporation, as soon as they took over the tramway undertaking, placed themselves in the ordinary position of tramway undertakers and they must at least remain liable, as tramway undertakers, until the lines have been taken up and until their part of the road has been restored to as good a condition as before the tramways were laid. So long as the franchise continues the corporation, as the tramway undertakers, have all the obligations of the franchise.

Lynskey K.C. and *Kennan* for De Luxe Car Services.

F. A. Sellers K.C. and *A. E. Baucher* (for *Basil E. Nield*, on war service) for the respondent corporation. The main defence of these defendants is that at the time of the accident they had ceased to be tramway undertakers. The first part of s. 28 of the Act only applies when the tramway undertaking is being actively carried on. Further, it has not been established that, as tramway undertakers, the corporation has not complied with s. 28 by keeping the road in good condition and repair with such materials and in such manner as the road authority (also the corporation) shall direct and to their satisfaction within the first part of s. 28. They are, having regard to the wording of the section, under no greater obligation than that of satisfying the road authority, i.e., themselves. There must be someone to say what is the standard required.

In *Dublin United Tramways Co., Ld.* v. *Fitzgerald* (1) Lord Halsbury deals with the interpretation of the section.

The rails have been filled in and blotted out and have ceased to be the tramway, and the liability of the corporation is no higher than that which is put on it by the road authority.

(1) [1903] A. C. 99.

In this case, if the tramway company do not take up their rails, they abandon the tramway to the local authority. As soon as the tramway has been abandoned the road authority becomes responsible for the surface of the road. The liability could only continue so long as the rails remained.

SIR WILFRID GREENE M.R. I will deal first of all with the appeal so far as it concerns the first defendants, De Luxe Car Services. The learned judge found that the driver of the car was driving with skill and care, and carried out an ordinary, simple and perfectly normal manœuvre. It is said, with reference to that finding, that the circumstance that the car knocked over three boys on bicycles and damaged a garage, if unexplained, is sufficient evidence of negligence on the part of the driver. I will assume the correctness of that proposition, but we are not concerned here with questions of burden of proof. We are concerned to see whether the finding of the learned judge upon the whole of the facts before him that the driver was not guilty of negligence is one which ought to be allowed to stand.

The explanation of the fact that this motor car found itself in a place where it ought not to have been was that a skid had taken place and, further, that the skid was not due to any negligence on the part of the driver. That explanation the learned judge accepted as true in fact and, if that finding stands, there is an end of the case as against the first defendants.

I do not find myself assisted by considering the meaning of the phrase "inevitable accident." I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence? It seems to me that not only was there ample evidence to support the learned judge's finding, but that that finding was the correct finding in view of the evidence that was given.

Mr. Hemmerde quite rightly called attention to the fact that the road was in a condition which required the exercise of care and it was in that condition to the knowledge of the driver of the car, but it is not right to say that because (*a*) the road was known to be in a dangerous condition and (*b*) an accident took place, it follows that the driver must have been negligent. The degree of care which is called for from a driver depends upon the circumstances of the case. A driver who is proceeding along a piece of road which he knows to be slippery has imposed upon him the burden of driving with an extra degree of care. Certain manœuvres upon such a road would no doubt be dangerous, and any prudent driver would know that they were dangerous. A sudden alteration of direction, a sudden application of brakes, driving in such a way that one or other of those two manœuvres may suddenly become necessary—all those are things which the prudent driver must avoid; but if a driver upon a road, which he knows to be slippery, is driving with that measure of care which, in ordinary circumstances, would be perfectly safe upon such a road, he is not to be found guilty of negligence because, for some reason or another, an accident takes place owing to a skid.

The driver in the present case, driving at a perfectly proper speed on a straight line and at a steady pace (because his actual acceleration had finished and he was driving, as he says, at a steady acceleration; that is to say, his pressure upon the accelerator pedal was steady) suddenly finds himself involved in a skid. It seems to me that there was nothing in the manœuvre which he executed which a prudent driver would not have thought it perfectly proper and safe to execute notwithstanding the condition of the road. In those circumstances it seems to me that the finding of the learned judge was not only justifiable, but right.

In the result, therefore, the appeal so far as it concerns the first defendants, must be dismissed.

I now come to deal with the case of the second defendants, the Corporation of Birkenhead. That corporation acquired a tramway undertaking which, we are told, had previously belonged to a limited company, which had obtained the right to lay the tramway and run the undertaking. It is not disputed that the provisions of the Tramways Act, 1870, apply to the Birkenhead Corporation in relation to this tramway unless, in the events which have happened, the obligations laid upon

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undertakers by that Act have ceased to apply as, on one branch of the argument, it is said that they have ceased to apply.

It appears that the tramway in question has not been used since the year 1932. Taking the position as at the date when the tramway was still a going concern in the hands of the Birkenhead Corporation, there can be no question, and, indeed, the contrary is not suggested, that the obligation of the corporation as the holder of the tramway franchise in relation to the maintenance and repair of part of the roadway, was the obligation imposed by the first sentence of s. 28 of the Tramways Act, 1870. Here I must deal with a point raised by Mr. Sellers, indeed, it was the first point that he raised, when he said that considerations of that kind are beside the point, because it is not established in this case that the skid, which was the cause of the accident, was due to any defect in the surface of the roadway within the Borough of Birkenhead. That suggestion is a new one raised in this Court. The statements of claim in terms alleged that these matters took place within the Borough of Birkenhead and there is no specific traverse of that allegation, nor can I find from beginning to end of the transcript of the shorthand note any suggestion put to any witness that the actual skid which caused the accident began and was caused by something outside the limits of the borough. In my opinion it is not proper to allow a case of fact of that kind to be raised in this Court and, therefore, I say no more about it.

The substantial arguments raised on behalf of the corporation relate to the true construction of s. 28 of the Tramways Act.

[His Lordship read the first sentence of the section, and continued :] The case proceeded on the footing, although there is no specific finding on the matter, that the skid in question took place within the area with regard to which the promoters are placed under a liability by those provisions. The finding of the learned judge was to the effect that the skid was caused by the dangerous condition of the road ; indeed, it is not surprising that, having found that, notwithstanding the propriety of the manœuvre executed by the driver and the care with which it was carried out, a skid took place, he should proceed to find that the road surface was dangerous, because skids of that kind do not take place in such circumstances unless there is something the matter with the road. But his finding is quite specific. He says, "In my judgment the surface of the road was treacherous and dangerous because in the course of time these granite setts had become highly polished and presented a surface that was certainly dangerous for the motorists." There was ample evidence to support that finding. It is perfectly true that the case for the plaintiffs was run on certain alternative suggestions. The asphalt put into the rails, either alone or in combination with the state of the setts, was one suggestion, and there were others, but this was part of the plaintiffs' case. It is amply covered by the pleadings and there is evidence to support the finding. I can find nothing in the evidence to justify me in differing from that conclusion of fact, and the question must, therefore, be approached upon the basis that that finding stands.

On that basis Mr. Sellers, for the corporation, said, in the first place, that that finding does not constitute a finding to the effect that the road was not maintained in a way sufficient to satisfy the first sentence of s. 28. The mere fact that the setts had become shiny and slippery was not, he said, by itself, a matter of improper maintenance or disrepair. I need only say with regard to that that a precisely similar state of affairs was considered in the case of *Dublin United Tramways Company, Ld.* v. *Fitzgerald* (1). So far as the condition of the setts is concerned, that case appears to me to be on all fours with the present case. In my judgment, the learned judge's finding is a perfectly proper finding to the effect that the roadway was not maintained in a way to satisfy the first part of s. 28.

Then it is said that there can be no liability on the promoters under that part of the section unless and until the road authority indicate that they are dissatisfied with the state of maintenance and repair of that part of the roadway for which the promoters are responsible. In my judgment that is a misconstruction of the section. The result, in the present case, if that construction

(1) [1903] A. C. 99.

were right, would indeed be curious. In considering the construction of the section it is worth observing that the Act contemplates and makes provision for the purchase of tramway undertakings by local authorities who, in the normal case, would also be the road authority for the district. Where such a purchase takes place under s. 43 the purchasing authority is to be deemed to be the promoter. Accordingly, where such a thing has happened, if Mr. Sellers' argument is right, s. 28, in its application to such a state of facts and taking the name of the present corporation to illustrate the point, would run like this: "The Birkenhead Corporation shall, at their own "expense, at all times maintain and keep in good condition "and repair, with such materials and in such manner as the "Birkenhead Corporation shall direct and to the satisfaction "of the Birkenhead Corporation . . . ." If the argument is right, all that the corporation would have to do in order to avoid the responsibility put upon promoters of tramway undertakings by the Act would be to refrain, as the road authority, from issuing to itself as the owner of the tramway undertaking the necessary direction. In other words, the local authority acquiring a tramway undertaking would have the power to put itself in the happy position that, in respect of that part of the roadway for which the undertaking is responsible, it could never be liable for non-feasance. That seems to me to be a reason for thinking that the construction suggested by Mr. Sellers is not the right one.

But, in my opinion, the question is concluded by authority, namely, the *Dublin* case (1) to which I have referred. It is perfectly true that in that case the local authority had required the tramway company to take precautions to deal with the slippery state of the setts by placing sand upon them, or by some other reasonable and proper method, but I do not find in the speeches in that case any indication that that requisition by the road authority was in any sense a condition precedent to the liability of the tramway company. On the contrary, the language of the noble and learned Lords concerned in that case appears to me to negative any such proposition.

(1) [1903] A. C. 99, 105, 107.

Lord Halsbury, for instance, says, "The obligation, as I read "the statute, is to keep that portion of the highway in a fit "and proper condition for public traffic." Lord Davey says, "What then was the duty of the tramway company when the "granite setts had become in this state? They must keep this "roadway 'in good condition and repair,' and if the roadway "as originally constructed had by the wearing of the traffic "or by any other cause been brought into such a state as to "become slippery and dangerous to horses passing over it, it "is clear that their obligation was not fulfilled of keeping "it in a good condition. Their duty then was to restore it to "a good condition." Indeed, to construe the sentence in the way that Mr. Sellers would have us construe it appears to me to cut down the liability of the tramway company, who, after all, has placed upon the highway what, but for the statute, would be a nuisance, to a degree which, in many cases, might be a grievous injury to the public interest and would be particularly ridiculous in a case where the authority acquiring the tramway was itself the road authority. In my opinion, therefore, that point fails.

The remaining point taken by Mr. Sellers (and this point commended itself to the learned judge) was of this nature. He said that the first sentence of s. 28 did not apply to the facts of this case at all for the reason that in the year 1932, and since, the tramway has been abandoned. Now what in fact has happened is that the rails have been left in position, the granite setts between the rails and on each side of them have been left, and the grooves in the rails have been filled up with some bituminous substance. The argument in effect is that the promoters of a tramway can divest themselves of an obligation with regard to maintenance under the first part of s. 28 merely by discontinuing the running of their trams. That appears to me to be a proposition which it is quite impossible to support. The holder of a tramway franchise conferred upon him by statute cannot divest himself of the responsibilities which that franchise carries merely by ceasing to avail himself of it. It that were so, the owner of this franchise, which entitles him to place what would otherwise be a nuisance upon the highway, can desert the works which he has constructed there at any moment he pleases and get rid of the liability which was imposed upon him when he was empowered by the Legislature to execute those works.

In the present case Mr. Sellers admitted that the corporation still have the statutory status of promoters within the meaning of s. 28. Their franchise, he agrees, still exists. They have never been deprived of it, and again he agrees that, if the corporation so chose, they could to-morrow run trams along those tracks after they had taken the necessary steps to remove the bitumen that they have placed in the grooves. In other words, they are still, admittedly, promoters of this tramway undertaking, although they have not exercised their franchise with regard to the running of trams since the year 1932; but they still exercise their franchise in an important respect, namely, they are maintaining on the public highway rails which the franchise entitled them to place there. Accordingly, when I re-examine, without re-reading, the language of the first sentence of s. 28, I find that it applies with perfect accuracy to the present state of facts. The Birkenhead Corporation are still the promoters; the tramway, which means the track, belongs to them, and I can see nothing, either in that sentence or in any other part of the Act, which, when once those facts exist, can divest them of the consequential liability of repairing and maintaining the part of the roadway referred to.

In my opinion, the learned judge was wrong in holding that this part of the section did not apply to the present case. He held that the part which did apply was the second sentence of the section which is as follows, reading sufficient of the words to make the sense plain: "If the promoters abandon their "undertaking, or any part of the same, and take up any tramway "or any part of any tramway belonging to them, they shall "with all convenient speed . . . . fill in the ground and make "good the surface and, to the satisfaction of the road authority, "restore the portion of the road upon which such tramway "was laid to as good a condition as that in which it was before "such tramway was laid thereon." As the foundation for the learned judge's ruling that the provision applied to the present case, he found as a fact that the promoters, that is to say, the Birkenhead Corporation, had abandoned their undertaking or part of it and had taken up the tramway or part of it. In my opinion, that finding of fact, so far as taking up the tramway is concerned, is not justified. He said, " It is quite "true they have not pulled up the rails, but everything else "connected with the tramways disappeared; the standards, "and so on, for bringing the current to the trams, the tram stops "and all the other apparatus of a tramway have been completely "obliterated." The standards, in fact, are still there, although they are used for electric light and not for overhead power cables; but it seems to me that he has misconstrued the word " tramway " in this sentence, because that word, in my judgment, applies to the actual track. The obligation which is imposed is the obligation to make good the surface after removal of the tramway; they are to restore that portion of the road upon which the tramway was laid.

In my opinion, it is not possible to say that the promoters have taken up this tramway or any part of it. That being so, this part of the section does not apply to the case.

That, I think, really covers all the arguments which were put forward by Mr. Sellers. He said, as a reason for thinking that his submissions were right, that it would be a dreadful thing if this local authority were placed under an obligation to deal with the road in accordance with the language of the Tramways Act when it had abandoned the use of its tramway for so many years. I am afraid that is an argument which does not appear to me to carry any weight at all. It is not an argument which one would have expected the Birkenhead Corporation to have put forward if the tramway had still belonged to the company which originally owned it and that company had discontinued running its trams and left the portion of the roadway in which the rails are laid to look after itself. In those circumstances I can see the Birkenhead Corporation most anxious to take care that the tramway company was held to its statutory obligation. If the corporation chooses to leave this track in the road and to leave it in such circumstances that its use can be resumed, and takes no step to divest itself of its franchise, I can see no hardship whatsoever upon the corporation being left under the liability imposed by s. 28 on promoters who maintain in the public roadway what but for the statute would be a nuisance. If they wish to get rid of those obligations it is perfectly simple for them to do so. They can abandon the undertaking and take up the tramway. The only obligation they then fall under is to make good the surface and, when once they have done that, their obligations in respect of the roadway as promoters of the tramway undertaking necessarily come to an end and thereafter their only obligation would be that of a road authority and they would not be liable for mere non-feasance. If they choose to maintain the physical track in the road in such circumstances as these, it seems to me that they have no good ground for complaint if the obligation which is imposed upon the promoters of the tramway is held to continue against them.

In the result, therefore, this appeal succeeds against the Birkenhead Corporation.

SCOTT L.J. I agree.

GODDARD L.J. I agree.

Appeal against De Luxe Car Services dismissed.
Appeal against Birkenhead Corporation allowed.

Solicitors: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead*; *Mayo, Elder & Co., for Rutherfords, Liverpool*; *Ranger, Burton & Frost, for G. F. Lees & Son, Birkenhead.*

J. L. D.

C. A.
1941
March 19.

BOUDOU *v.* THORNTON-SMITH.

Emergency legislation—Landlord and tenant—War damage—Premises "unfit"—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 *Geo.* 6, *c.* 72), *s.* 6, *sub-s.* 1 ; *s.* 24.

Where business premises were damaged as a result of enemy action and the evidence on both sides was unanimous that, at the time when the tenant served on the landlord a notice of disclaimer of the lease, under s. 6, sub-s. 1, of the Landlord and Tenant (War Damage) Act, 1939, the state of the premises was such that business could not be carried on there :—

Held, that it necessarily followed that the premises were "unfit" within the definition contained in s. 24 of the statute ; and that the notice of disclaimer was effectual.

Appeal from the Westminster County Court.

By a lease dated June 25, 1930, Gaston Boudou demised certain business premises, situate in Conduit Street, London, to Ernest Thornton-Smith for twenty-seven and three-quarter years less three days. The premises were divided into four shops and basements, of which two were empty and the remaining two were occupied by tenants.

On the night of September 24, 1940, a bomb fell in the neighbourhood of the premises, with the result that all the glass was blown out, ceilings were damaged, doors were blown in, panelling was destroyed and door posts were twisted. The tenants of two of the shops did some temporary repairs by putting in some plaster-board or other material, leaving a panel open as a shop window ; but they repaired the premises sufficiently to enable them to carry on business.

On October 25, 1940, a notice of disclaimer was served on behalf of the tenant on the landlord. The landlord applied to the Court under s. 6 of the Landlord and Tenant (War Damage) Act, 1939, for an order that the notice of disclaimer (on the ground that the premises were unfit by reason of war damage) was of no effect, as the said premises were not unfit within the meaning of s. 24 of the statute.

The county court judge said : "I have considered the "evidence and have had regard to the definition of the word "'unfit' in s. 24 of the Act, to the matters specifically referred "to in that definition and to all other circumstances, and I "determine that the notice of disclaimer dated October 25, "1940, and served by the respondent on the applicant is of "no effect on the ground that the land comprised in the lease "was not unfit by reason of war damage at the time when the "notice was served."

The tenant appealed.

H. J. Astell Burt for the appellant. The county court judge misdirected himself as to the meaning of the word "unfit." The test is fitness for use for the purpose for which the premises were being used. As soon as the landlord has rendered the premises usable, by temporary repair, he has rendered them fit.

W. E. P. Done for the respondent landlord. Sect. 6, sub-s. 1, is intended to give the landlord guidance as to whether he can assume liabilities. It is intended to give him the option to obtain the view of the Court as to whether the disclaimer is based on fact and not on fiction. This is indicated in sub-s. 4 of that section. The landlord can only enter and do repairs if he serves a notice to avoid disclaimer.

Goddard L.J. [delivering the judgment of the Court, said :] This is an appeal from a decision of Judge Austin Jones at the Westminster County Court who, upon an application by a landlord on whom a notice to disclaim a lease had been served by a tenant under the Landlord and Tenant (War Damage) Act, 1939, decided that the notice was of no effect. The tenant appeals against that finding and says that there was no evidence upon which the learned judge could find as he did. It is to be observed in the first place that under the Landlord and Tenant (War Damage) Act, 1939, s. 1 avoids any obligations which have been entered into either by the landlord or the tenant to repair where the necessity for repair arises from war damage. Then by s. 4 of the Act it is provided that where land comprised in a lease is unfit by reason of war damage certain provisions shall have effect : one of those is that the tenant may serve a notice referred to as "a notice of disclaimer" stating that he elects to disclaim the lease. If he has elected to disclaim the lease, then s. 6, sub-s. 1, provides that on being served with this notice the landlord or any other person having an interest in or derived out of the term created by the lease to which the notice relates "may, at any "time within one month from the service of the notice, apply to "the court to determine whether the notice is of no effect "on the ground that the land comprised in the lease was not "unfit by reason of war damage at the time when the notice "was served." Sub-s. 4 of that section provides: "If .... the "court determines that the land in question was unfit by "reason of war damage at the time when the notice of "disclaimer or notice to elect was served, the period allowed "under this Act within which a notice to avoid disclaimer "may be served by the landlord, or the notice to elect is to "be complied with by the tenant, as the case may be, may be "extended to such date as the Court may fix." Then in s. 11 there are provisions under which the landlord can serve a notice to avoid disclaimer; and the machinery provided by that section is this. Having been served with notice of disclaimer by the tenant, the landlord serves a counter-notice; under that counter-notice he can object to the disclaimer because he is willing to do the repairs, and if he does serve a notice to avoid the disclaimer, then he undertakes the obligation to put the premises into a fit condition, but in the interval no rent will be payable. The only other section on this part of the judgment to which it is necessary to refer is the definition section (s. 24). In that section there is a definition of the word "unfit"; and for the purpose of this case it is enough to say that "unfit" means "unfit for "the purpose for which those buildings or works were used "or adapted for use immediately before the occurrence of the "war damage in question, having regard to the class of tenant "likely to occupy similar buildings or works which are not "unfit for that purpose" and various other matters which we need not take into account here.

The property with which we are concerned is a property in Conduit Street let for a term of over twenty-seven years at a rent of 1500*l*. a year. It is in fact divided into four shops, of which two are empty and two are occupied by tenants. On the night of September 24/25, a bomb fell in the neighbourhood of the premises with the result that all the glass was blown out and certain other damage was done, with which we are unhappily only too familiar; ceilings were damaged in whole or in part, doors were blown in, panelling was destroyed and door posts were twisted, and so forth—the sort of damage which we can see at so many places in London and elsewhere now where a building has been exposed to the blast of a bomb although the bomb has not actually struck the building. The tenants of two of these shops did some temporary repairs; they put in, I gather from what has been said, some plaster-board or other material, leaving a panel open as a shop window, but they did enough repairs to enable them to carry on business. When the notice was served the premises were, according to the evidence of the surveyor called by the applicant, in such condition that business could not be carried on there; some temporary repairs were necessary before business could be carried on. It is needless to say that the surveyor called for the plaintiff was equally of that opinion, but he put the case a good deal higher than the surveyor called by the landlord. The evidence which I have just read was the evidence given by the landlord's own surveyor; he was taking upon himself to assert that the premises were not unfit and therefore that the notice of disclaimer was of no effect. The evidence before the learned county court judge was all one way; all the witnesses who were called agreed that the state of the premises was such that business could not be carried on there without at least some repairs being done. It may be that the repairs which were necessary to be done to enable business to be carried on on the premises were very small. If, however, premises are in such a condition that the purpose for which they were let (in this case as shop premises) cannot be effectually carried out it must follow that the premises are unfit. The Act does not say, "if they are unfit to a small "degree" or "if they can be put right (and the obligation is "on the tenant) he shall not have the right to disclaim the "lease." The scheme of the Act clearly is that, if the tenant serves a notice saying that the premises are unfit, and they are unfit, the landlord has the option either of accepting that notice (in which case the lease will come to an end) or of serving his notice to avoid disclaimer, in which case he will have to do the repairs. In truth the business side of this question is: "Who is liable to do the repairs necessary to "make those premises fit for the purpose for which they were let?"—and the answer to that is: "the landlord."

[After reading the judgment of the county court judge, his Lordship continued:] As I have pointed out, the evidence that it was unfit is all one way, and I think the learned county court judge must have meant by his judgment that he thought that the damage which was existing was damage which could easily be put right and that, therefore, the premises were not to be regarded as unfit, perhaps in his own mind giving to the word "unfit" the meaning of something in the nature of permanently unfit or unfit to such an extent that the premises would require rebuilding. The Act says nothing about that.

Here there is unanimity among the witnesses that business cannot be carried on upon the premises. It follows that the premises are unfit, although it may be that, by the expenditure of a comparatively small sum, they could be put right. Although it is not necessary to give a final decision upon the matter, I do not think that s. 11 imposes on the landlord a higher obligation than to make the premises reasonably fit for the purpose of carrying on the business. If a plate glass window is blown out and the class of premises is one for which a window is essential (as would be the case in most shops at any rate) then the plate glass window will have to be put back. It does not follow that every scar or every scratch that has been caused in the shop by reason of flying glass has to be repaired: the premises have to be placed in such a condition that business can reasonably be carried on there. I think that the learned judge must have overlooked the scheme of the Act in this respect. At any rate, on reviewing the evidence, as we have done, we think that it is impossible

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to support his conclusion that on that evidence he was entitled to find that the premises were not unfit. I think that we must find that the premises were unfit, and that would leave the landlord the opportunity which has been given to him by the sections which I have read of applying now to the Court for leave to serve notice to avoid disclaimer if he so desires, in which case he will have to do such repairs as are necessary.

Mr. Astell Burt took one other point upon which it is necessary only to say a word, because he has not persisted in it. These premises were included in one demise: the tenant, having acquired the lease, proceeded to divide them into four shops; and Mr. Astell Burt contended that thereupon the lease became a multiple lease within the meaning of the Act, which defines that term as meaning a lease comprising buildings which are used or adapted for use as two or more separate tenements; he said that under those circumstances the procedure under s. 6 was inapplicable and that the whole of the proceedings were without jurisdiction as the judge should have proceeded under s. 15. That was an objection which was not taken until the morning when the learned county court judge was about to deliver his reserved judgment. The case had hitherto proceeded on the basis that the proceedings were properly instituted under s. 6, and Mr. Burt, according to the learned judge's note, had said when addressing him at the hearing: "Only one question—whether on October 25, "1940, these premises were fit." It is not surprising that the learned judge refused to allow an entirely new point to be taken, and we think that he was right. It is impossible to say that he had no jurisdiction. If the parties chose to proceed upon the footing that this was one lease they were at liberty to do so, and it is unnecessary for us to give a decision to-day upon the point which was adumbrated in the argument, whether, whereas between the landlord and the tenant there is a demise of one building or piece of land, if the tenant chooses to turn that building, either by some permission given in the lease or because the landlord does not object, into two or more tenements or shops, that makes the lease a multiple lease. We need express no opinion upon that because it is not necessary in the particular case.

The result is that the appeal must be allowed with costs here and below.

MACKINNON L.J. The judgment which has been delivered by Goddard L.J. is the judgment of the Court, but I should like to add the following observations. During the course of the argument I have had the very gravest doubts and difficulties as to the proper construction of various parts of this very obscure Landlord and Tenant (War Damage) Act, 1939. Goddard L.J. has resolved a good many of those difficulties, and I think that he is right as to the main structure of this Act. The learned county court judge appears to have held that this demised property was not unfit by reason of the fact that it could be made fit by the expenditure upon repairs of a comparatively small amount of money, as was shown by the fact that two of the sub-tenants had in fact done those repairs for themselves. There may well be a case where the amount of repairs necessary is so small that the maxim de minimis non curat lex applies; but apart from that, the view that they are not unfit because the tenant can repair them at a comparatively small expense runs, I think, counter to the express provision of s. 1 of the Act—namely, that any obligation to repair under a lease in regard to war damage is rendered nugatory and of no effect. I cannot think that the learned judge was right in saying that those premises are fit, or, putting it the other way are not unfit, because the tenant could do the repairs at a fairly moderate expense. The tenant is under no obligation to do such repairs, and the machinery of the Act puts that obligation, not as a direct obligation, but indirectly, on the landlord, if he is to reap thereby the benefit of being able to serve a counter-notice to negative the result of the tenant's notice of disclaimer.

There is only one other thing that I want to say. I express no opinion on the question raised by Mr. Astell Burt whether in the case of a single demise of large premises by what I may call a head landlord to a tenant and a sub-demise by that

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tenant of portions of those large premises to a separate tenant, that creates the first tenancy a multiple lease within the meaning of s. 15. I have very grave doubts whether it does, but I express no opinion upon it. I agree in the result proposed by Goddard L.J.

du Parcq L.J. I should like to add, for myself, that I also express no opinion on the question whether in the circumstances of this case the lease could be said to be a multiple lease within the definition section, s. 24 of the Act.

The only other thing that I would like to add is this. I hope that it will be understood that there is nothing in the judgment of this Court to-day to suggest that, where, on the evidence, it is open to a county court judge to find that the premises are not unfit for use, a finding to that effect is at all likely to be disturbed by this Court; indeed where there is no ground for saying that the learned judge has misdirected himself as to the law and where there is evidence to support the finding, it would not be open to this Court to disturb such a finding. I am convinced, however, that in this case the learned judge did take the view that the premises could properly be said to be not unfit because, although they were not fit at the material date, it would be a very easy matter to make them fit. That will not do, in my opinion; in fact I think it is impossible to argue that that is sufficient ground for the decision, especially when one remembers that there is no obligation on the tenant, or on anyone else for that matter, apart from the provisions as to a notice to avoid disclaimer, to do repairs where the damage may properly be described as war damage.

I agree that this appeal must be allowed.

Solicitors: *Forsyte, Kerman & Phillips; Harris, Chetham & Cohen.*

J. L. D.

TURNER *v.* STELLA BOND, LIMITED, AND ANOTHER.

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March 20.

Emergency legislation—Landlord and tenant—War damage—Rent payable in advance—Premises injured by enemy action—Notice of disclaimer—Notice to avoid disclaimer—Rent not payable for part of quarter commencing from date of service of notice of disclaimer—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 *Geo.* 6, *c.* 72), *s.* 11, *sub-s.* 1 (*b*).

The Landlord and Tenant (War Damage) Act, 1939, s. 11, sub-s. 1 provides: "Where a notice to avoid disclaimer is served in "respect of a notice of disclaimer, the notice of disclaimer shall "be of no effect and . . . . the lease to which it relates shall have "effect subject to the following modifications:— . . . . (*b*) . . . . "no rent shall be payable by the tenant under the lease in respect "of the period beginning with the date of the service of the notice "of disclaimer and ending with the date on which the land is "rendered fit.":—

Held, that when under a lease rent was made payable in advance and, as the result of damage to the premises by enemy action, the tenant served a notice of disclaimer of the lease, to which the landlord replied by a notice to avoid disclaimer, s. 11, sub-s. 1 (*b*), of the Act applied so as to make the rent, which was in arrear, not payable for the period beginning on the date of service of the notice of disclaimer and ending when the premises were rendered fit.

Per MacKinnon and Goddard L.JJ. If the rent had been paid on the due date, the tenant could have recovered the amount of rent paid in respect of the same period.

APPEAL from His Honour Judge Davis sitting at Bloomsbury County Court.

By a lease dated January 9, 1940, the plaintiff (the landlord) demised to the defendants, Stella Bond, Ld. (the tenants) part of the third floor of 71 and 73, Great Portland Street, London, for the term of two years from December 24, 1939, at the yearly rent of 265*l.*, payable quarterly in advance on the usual quarter days, and the yearly rent of 15*l.* in consideration of central heating supplied. The defendant, Arthur Abrahams, joined in the lease to guarantee the payment of the rent and the performance of the covenants and conditions on the part of the tenants contained in the lease. The premises were damaged as the result of enemy action on November 9, 1940, and the tenants by their solicitors gave a notice of

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disclaimer of the lease under s. 4, sub-s. 1 (1), of the Landlord and Tenant (War Damage) Act, 1939, on the ground that the premises had been rendered unfit for use by war damage. On December 4, 1940, the landlord, by his solicitors, gave notice to avoid the disclaimer under s. 4, sub-s. 5 (1), of the Act. On December 5, 1940, the landlord began proceedings in the county court to recover the quarter's rent of 66*l.* 5*s.* due in advance on September 29, 1940, less a sum of 32*l.* 15*s.* (being the rent due for the period September 29 to November 9) paid by the tenant on November 25. The claim also included a claim for the quarter's rent for central heating, but this was afterwards abandoned. The tenants set up the provisions of the Act as precluding the landlord from recovering the amount of rent claimed.

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(1) By Landlord and Tenant (War Damage) Act, 1939, s. 4: "(1.) Where the land comprised in a lease is unfit by "reason of war damage, the "following provisions of this "section shall have effect, whether "the lease was made before or after "the commencement of this Act. ". . . . (2.): The tenant may "serve on the landlord . . . . (*a*) a "notice (hereafter in this Act "referred to as a 'notice of dis-"'claimer') stating that he elects "to disclaim the lease . . . . (5.): "Where a notice of disclaimer "is served . . . . the landlord "may, within the period allowed "under this Act, serve upon the "tenant a notice (hereafter in "this Act referred to as a 'notice "'to avoid disclaimer') requiring "the tenant to retain the lease on "the terms hereafter specified in "this Act."

Sect. 11, sub-s. 1, provides: "Where a notice to avoid dis-"claimer is served in respect of a "notice of disclaimer, the notice "of disclaimer shall be of no "effect and, unless the notice of "disclaimer is of no effect by "reason of some other provision of "this Part of this Act, the lease to "which it relates shall have effect "subject to the following modifica-"tions: (*a*) There shall be implied "in the lease . . . . a covenant by "the landlord with the tenant that "the land comprised in the lease "shall be rendered fit as soon as is "reasonably practicable after the "service of the notice to avoid "disclaimer: . . . . (*b*) Subject to "the powers of the court under "the next following paragraph, "no rent shall be payable by the "tenant under the lease in respect "of the period beginning with "the date of the service of the "notice of disclaimer and ending "with the date on which the land "is rendered fit: (*c*) If the court "is satisfied, on the application "of the landlord made at any "time before the land has been "rendered fit, that any part of "the land is capable of beneficial "occupation, the court shall have "the same powers as it has under "paragraph (*c*) of sub-section (1) "of the last foregoing (s. 10 (1) (*c*)) "section."

These powers are to "direct "that there shall be payable by "the tenant such rent, at such "times and in respect of such "period as the court may fix."

The county court judge held that para. (*b*) of s. 11, sub-s. 1, of the Act must be read as a term of the lease, and, so as not to be inconsistent with the covenant that rent was payable in advance, must be held to refer to rent accruing due after, and not before, the war damage. He, therefore, gave judgment for the landlord. The tenant appealed.

H. G. Garland for the tenants. The county court judge was in error in holding that the provisions of s. 11, sub-s. 1 (*b*), of the Act must be read into the lease. They do not constitute a statutory modification of the lease. That is the difference between paras. (*a*) and (*b*). Para. (*a*) is expressly implied in the lease. Para. (*b*) is not, but it is a statutory provision releasing the tenant from liability for rent during the period specified. That applies equally well when rent is payable in advance.

[MACKINNON L.J. The appellants' argument must go so far as to say that if the quarter's rent had been paid on September 29, part of it would have been recoverable.]

That is not essential to the present appeal, although it can well be argued that an obligation to repay would be implied. Para. (*b*) provides that "no rent shall be payable by the "tenant" during the period named and those wide words amply cover a case where rent is payable in advance. The word relied on by the county court judge was "modifications" as showing that para. (*b*) must be read into the lease and construed with it, but it is the effect of the lease which has to be modified and the effect of the covenant to pay rent is modified by making none payable during the period of the unfitness of the premises. Even if para. (*b*) were read into the lease it would operate as a proviso to the covenant to pay rent and make no rent payable during the period of unfitness. Sect. 10, sub-s. 1 (*c*), supports this contention.

B. L. A. O'Malley for the landlord. A tenant who paid his rent punctually in advance could not be in a worse position than a tenant who was in arrears with the payment. If, when

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the rent in the present case was not paid on September 29, the landlord had to sue and sued the tenants and obtained judgment, the rent would have merged in the judgment debt and the words of s. 11, subs. 1 (b), would have no application to make part of it repayable. Again if the notice of disclaimer had been allowed to stand, s. 8 of the Act would have applied and under subs. 2 the lease would have been deemed to be surrendered as from the date when the notice of disclaimer was served. In such a case if the rent had been paid in advance, no part of it would have been recoverable. When the words of s. 11, subs. 1, are read without regard to para. (c), it is fairly clear that "modifications" means modifications of the lease. Para. (c) creates a difficulty as it confers powers on the Court and the only possible view is that "modifications" is an apt word for paras. (a) and (b) only. On that view the county court judge was clearly right.

[Sir Wilfrid Greene M.R. It would be very curious if the question whether the tenant obtained relief under the Act depended on whether the damage was done the day before or the day after quarter day.]

The result would seem very capricious, but that is often so under statutes. In any case the tenant gets the relief of having his premises put in repair by the landlord while the landlord gains nothing.

Sir Wilfrid Greene M.R. The question for our decision, shortly stated, is whether that proportion of the rent payable under a lease on September 29, 1940, in respect of the ensuing quarter, which is referable to the period between the service of the notice of disclaimer and the end of that quarter, can be claimed by the landlord.

The notice of disclaimer served on November 4 was followed by a notice to avoid disclaimer, and the result of that situation was that s. 11 of the Landlord and Tenant (War Damage) Act, 1939, came into operation. [His Lordship read the section.] The county court judge has read para. (b) as involving the insertion in the lease of a statutory provision in the same way as para. (a) adds an implied statutory covenant to the lease. The effect of that, he said, was to make applicable the rule of construction that, where in the same document you find two clauses which, literally read, may be inconsistent, you must do your best to reconcile them and give effect to both. I am doubtful whether the effect of para. *(b)* is what the learned judge thought it was. It seems to me that it may well be regarded, not as the implication of a term in the lease, but as an overriding statutory provision liberating the tenant from a contractual obligation. It is true that the words "subject to the following modifications" may point in the other direction, but when I look at para. *(c)*, which gives certain powers to the Court, I have great difficulty in reading its provisions as a statutory addition to the contract between the parties.

However that may be (and I do not find it necessary to express any concluded opinion on it), adopting the learned judge's method of approach, I have to ask myself what is the effect of the lease when modified by the force of this provision of the statute. It seems to me that that can best be shown by taking para. *(b)* and moulding it to meet the precise facts of the present case. It must on that basis be treated as a proviso to the covenant to pay rent. That covenant, in its application to the relevant facts of this case, was a covenant to pay on September 29 in advance one quarter's rent in respect of the quarter ending December 25, and to it must be added, in accordance with para. *(b)* of s. 11, sub-s. 1, words to the following effect: "Provided always that no rent shall "be payable by the tenant under this covenant in respect of "the period beginning with November 9, 1940, and ending "with the date on which the land is rendered fit." The effect of a covenant of that nature qualified by that proviso seems to me to be that, notwithstanding the covenant to pay in advance, in the events which have happened, that covenant is to be cut down and the tenant is to be treated as released from it in respect of the period stated.

Accordingly, I find myself in disagreement, with all respect, with the county court judge because it seems to me that the proper method of reading the two provisions together is to

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extract from them the result which I have indicated. It is not necessary to decide whether or not, if rent had been paid, it could have been recovered back. All that I need say with regard to that point is that as at present advised I see nothing that shocks me in the proposition that the rent could be recovered, nor do I see any insuperable difficulty in construing the section in a way which would produce that result. Expressing the matter in the language of the plain man, it would appear that the legislature is saying to the tenant: "Notwithstanding the fact that you have bound yourself to "pay rent in respect of a particular quarter, there shall be "cut out from that quarter so much of the quarter as comprises "the period when the premises were unfit and your obligations "shall be modified accordingly."

Curious results would follow if that were not the true construction. The tenant under a lease where the rent was payable quarterly in advance would be excused from payment of his quarter's rent if his house was rendered unfit the day before quarter day, but he would have to pay the whole of his quarter's rent if a bomb fell on his house on the day following quarter day.

I find some confirmation of the view which I have formed in the circumstance that the legislature in para. (*b*), knowing quite well (as it must have known) that there are innumerable leases in this country under which rent is payable in advance, has chosen to use words of the widest import, which, read in their literal and ordinary sense, cannot be construed in such a way as to exclude cases where rent is payable in advance. The learned judge took that view of the prima facie meaning of the words and I agree with him. I find it difficult to suppose that the legislature, if it had meant to exclude the well known and common case of rent payable in advance, would have used language of this character, and would not have qualified it by saying in express terms that it was not to be read as applying to rent payable in advance.

For those reasons I must disagree with the conclusion of the learned judge and, in my opinion, the appeal must be allowed.

MACKINNON L.J. I agree. I should not think it necessary to add anything if it were not for the fact that we are differing from the learned judge, who delivered an admirably clear and careful judgment. The question which was before him and which is before us arises on this obscure passage in the statute. I feel that the learned judge may well have been right, but, although I entertain that doubt, I am none the less constrained to express my difference from him. It is most unfortunate that nothing is said in s. 11 as regards rent payable in advance, a provision that is well known to be exceedingly common. Sub-s. 1 *(b)* says in clear terms that "no rent shall be payable "by the tenant under the lease in respect of the period beginning "with the date of the service of the notice of disclaimer and "ending with the date on which the land is rendered fit." When you have to apply that clear provision to the common case of rent paid or payable in advance, there is, so far as I can see, only one possible method by which effect can be given to it, namely, by treating it as imposing on the landlord an obligation to repay the part of the rent paid in advance which is proportionate to the period specified. I think it is only possible to give effect to this legislation by treating that provision as necessarily implied in its terms. It follows that I agree with the result indicated by the Master of the Rolls and think that this appeal should be allowed.

GODDARD L.J. I agree. For myself, I feel that one is necessarily faced with the question: Could this rent, had it been paid when it ought to have been paid, have been recovered by the tenant? Because it would certainly be an odd situation if a tenant who failed to perform his obligation to pay his rent punctually could be in a better position than a tenant who had performed his obligation. For the reasons which have just been given by MacKinnon L.J. I think that this rent would have been recoverable by the tenant if it had been paid on the due date because the lease must be read as though this provision were written in it; so that, although the lease says that the rent shall be payable in advance, there is a proviso that, if the premises are rendered unfit by enemy

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action, no rent shall be payable during the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land has been rendered fit. I can see no way of reconciling these two provisions except by implying a term that in such circumstances the landlord shall repay the rent for that period. I think that one can fairly imply a stipulation of that sort in this case, bearing in mind the well known judgment of Lord Esher M.R., in *Hamlyn & Co.* v. *Wood & Co.* (1), in which he says that "the "Court has no right to imply in a written contract any such "stipulation, unless, on considering the terms of the contract "in a reasonable and business manner, an implication "necessarily arises that the parties must have intended that "the suggested stipulation should exist."

I am expressing no opinion on what the position would be if in a case where rent is payable in advance, a notice of disclaimer is served and accepted by the landlord, and no counter-notice is served. That question would involve consideration of s. 8 of the Act. So far as I understand our judgment, we are dealing only with a case where notice to avoid disclaimer has been served and not where notice of disclaimer has been accepted by the landlord.

Appeal allowed.

Solicitors: *Sydney Redfern & Co.; Ashurst, Morris, Crisp & Co.*

(1) [1891] 2 Q. B. 488, 491.

H. C. G.

COOPER *v.* JAX STORES, LIMITED.

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March 21.

Emergency legislation—Landlord and tenant—War damage—Notice of disclaimer—Notice to avoid disclaimer—Subsequent attempt by landlord to substitute claim for different relief—Approbation and reprobation—Landlord and Tenant (War Damage) Act, 1939 (2 & 3 *Geo.* 6, *c.* 72), *s.* 6, *sub-s.* 1; *s.* 11, *sub-s.* 1.

Where a notice of disclaimer of a lease has been served under the Landlord and Tenant (War Damage) Act, 1939, on the landlord by the tenant on the ground of war damage to the premises and the landlord serves on the tenant a notice to avoid disclaimer and also of his intention to apply to the court for an order under s. 11, sub-s. 1 (*c*), of the statute directing that, as the premises were capable of beneficial occupation, rent should be payable by the tenants in respect thereof, the landlord cannot thereafter apply to the court under s. 6, sub-s. 1, of the Act for a determination that the notice of disclaimer was of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice of disclaimer was served.

Per Sir Wilfrid Greene M.R. *Semble,* the court has no jurisdiction, even with the consent of the parties, to entertain an application under s. 6, sub-s. 1, if the application be not made within one month from the service of the notice of disclaimer.

APPEAL from an order of the judge in the Mayor's and City of London Court on a preliminary point of law.

Premises, known as 35, Aldgate High Street, London, having been damaged by enemy action, on November 2, 1940, the tenants of the premises served on the landlord a notice of disclaimer of the lease under the Landlord and Tenant (War Damage) Act, 1939, s. 4, sub-s. 2. On November 29, 1940, the landlord served on the tenants a notice to avoid disclaimer under s. 11, sub-s. 1, of the Act (1), and also a notice that he

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(1) By Landlord and Tenant (War Damage) Act, 1939, s. 6, sub-s. 1: "Where a notice of "disclaimer is served—(*a*) any "person having an interest in or "derived out of the term created "by the lease to which the notice "relates; or (*b*) any person hav"ing an interest in the reversion "immediately expectant on the "determination of that lease; "may, at any time within one "month from the service of the "notice, apply to the court to "determine whether the notice is "of no effect on the ground that "the land comprised in the lease "was not unfit by reason of war "damage at the time when the "notice was served."

By s. 11, sub-s. 1: "Where "a notice to avoid disclaimer "is served in respect of a notice "of disclaimer, the notice of

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intended to apply to the Court for an order under "section 11" of the statute directing that the premises were "capable of "beneficial occupation and that rent shall be payable by the "respondents in respect thereof." At the hearing of the case, counsel for the landlord applied for leave to amend his application by substituting for "section 11" "section 6" and, for the words stating that the premises were capable of beneficial occupation and that rent should be payable by the respondents in respect thereof, the words "that the notice "of disclaimer is of no effect on the ground that the land "comprised in the lease was not unfit by reason of war damage "at the time when the notice was served." Counsel for the tenants objected that the proposed amendment was bad in point of law. The judge, however, allowed the amendment, and the tenants appealed on that point.

Squibb for the tenants. A landlord who has served a notice to avoid a disclaimer under s. 11, sub-s. 1, of the Act, cannot subsequently take proceedings under s. 6 to have it declared by the Court that the tenant's notice of disclaimer is of no effect on the ground that the premises were not unfit by reason of war damage when the notice was served. When a tenant serves a notice of disclaimer, the onus is on him for

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"disclaimer shall be of no effect "and, unless the notice of disclaimer is of no effect by reason "of some other provision of this "Part of this Act, the lease to "which it relates shall have "effect subject to the following "modifications :—(*a*) There shall "be implied in the lease, notwithstanding anything in Part I. of "this Act, a covenant by the "landlord with the tenant that "the land comprised in the lease "shall be rendered fit as soon as "is reasonably practicable after "the service of the notice to avoid "disclaimer : . . . . (*b*) Subject to "the powers of the court under "the next following paragraph, "no rent shall be payable by the "tenant under the lease in respect "of the period beginning with the "date of the service of the notice "of disclaimer and ending with "the date on which the land is "rendered fit : (*c*) If the court is "satisfied, on the application of "the landlord made at any time "before the land has been rendered fit, that any part of the land "is capable of beneficial occupation, the court shall have the "same powers as it has under "paragraph (*c*) of subsection (1.) "of the last foregoing section."

the first succeeding month to show that he has served it properly. As soon as that month has elapsed, s. 6, sub-s. 5, of the Act operates and the land is deemed to have been unfit, whether it was unfit or not. Proceedings under s. 11, sub-s. 1, are an alternative to those under s. 6, sub-s. 1, and the landlord has to elect which he will institute.

Lester for the landlord. The Legislature did not contemplate that a landlord who took proceedings under s. 11, sub-s. 1, would be for ever bound by that course and would be unable to take proceedings under s. 6, sub-s. 1. The matter should be determined under s. 6, so that the provisions under s. 11 would not come into operation.

Sir Wilfrid Greene M.R. It is to be observed that an application by a landlord under s. 11, sub-s. 1 (*c*), of the Landlord and Tenant (War Damage) Act, 1939, for an order that the tenant should pay rent in respect of the premises, relates to a case where part of the land is capable of beneficial occupation and the jurisdiction of the Court under that paragraph only comes to it as the consequence of the landlord's action in serving a notice to avoid disclaimer. The landlord in the present case, therefore, in making the application which he did, invoked a jurisdiction which the Court could only have through his having, by his own act, taken a step which resulted in conferring that jurisdiction on it.

When the case came on for hearing the landlord's case was, not that part but that the whole of the land was capable of beneficial occupation at the time when the notice of disclaimer was served. Counsel for the landlord obtained leave to amend the notice of November 29, 1940, by striking out the reference to s. 11 of the Act and substituting a reference to s. 6. In other words, under the guise of amendment the landlord was entirely abandoning his claim to the relief appropriate under s. 11 and was setting up a totally different claim under a different section, the effect of which, if affirmed, would produce entirely different results. In fact, this was not an amendment at all. It was the abandonment of one claim and the substitution of another. Counsel for the tenants

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did not object to that so-called amendment, but he intimated that he would object that an application under s. 6 was not competent in law. He did not take the point that the application for the so-called amendment could not be entertained by the county court judge as a matter of jurisdiction by reason of the time limit of one month imposed by s. 6 on the application to determine the question whether the land was not unfit at the time of the service of the notice. On the contrary, in so far as the parties were able to do so, they by consent conferred on the learned judge jurisdiction to decide a question raised after the expiration of the month permitted, which, according to the language of the section, he could only decide if raised within that month. The learned judge, by allowing the amendment, as he called it, could not ante-date the application which that amendment set on foot so that it should fall on the date of the original application under s. 11. A question at once leaps to the eye whether or not the court, even with that consent of counsel, had jurisdiction to entertain an application under s. 6 which was launched after the expiration of the statutory month. I do not propose to go into that question beyond saying that I cannot see how a consensual jurisdiction could be conferred on the court in view of the language of s. 6, sub-s. 5, which contains a peremptory direction that the land shall be treated, for the purpose of any proceedings pursuant to the notice of disclaimer, as having been made unfit by reason of war damage at the time of the service of the notice of disclaimer, unless the court decides on an application under the section, that is an application within a month, that the notice of disclaimer is of no effect. If the parties consensually purport to give the court jurisdiction to entertain an application under s. 6 after the expiration of the month, such an application being, it seems to me, a proceeding pursuant to the notice of disclaimer, the court is directed by that section, for the purpose of those proceedings, to treat the land as having been unfit, which leads to an absurd result. However, I do not express any concluded opinion on that matter, because Mr. Lester said that in this Court he was taken by surprise by the point

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and was not in a position to argue it since in the court below there was no objection to this so-called amendment.

The effect of serving the notice to avoid disclaimer is laid down in s. 11, sub-s. 1, as being that "the notice of disclaimer "shall be of no effect." In other words, as soon as the notice to avoid disclaimer is served on the tenant, the notice of disclaimer, which had during its currency a potential value, becomes a piece of waste paper with no legal effect and no potential legal effect. That being so, it seems to me that the landlord, having by his own action produced that result from which flow consequences of which I will speak in a moment, cannot thereafter change his attitude and say: "This notice "of disclaimer was of no effect owing to the fact that the "premises were not unfit at the time when it was served." It seems to me that that would be approbating and reprobating, because, be it observed, the very notice to avoid disclaimer, quite properly in the present case, informs the tenant that the landlord requires him to retain the lease on the terms specified under the Landlord and Tenant (War Damage) Act, 1939. It is only on the basis that the notice of disclaimer was served when the premises were unfit that the notice to avoid disclaimer can have any effect, because the terms specified in the Act on which the tenant is to retain the lease involve modification of the contractual relationship between the parties. A covenant by the landlord to render the premises fit is to be implied. The tenant is to be free from paying his rent until the land is rendered fit, and the court is given jurisdiction under paragraph (*c*) of s. 11, sub-s. 1, to grant a partial relief if part of the land is capable of beneficial occupation.

When the landlord in the present case served the notice to avoid disclaimer, he altered by that very act the whole legal relationship of the parties. Any assignee of the tenants taking an assignment of the lease after that date would have taken it subject to the modifications of the lease for which s. 11, sub-s. 1, provides. The landlord having produced that legal consequence, I cannot see how he can afterwards turn round and say: "I am now going to attack the notice of "disclaimer at its root. I am going to say under s. 6 that "there was no basis for it because the land was never unfit, "and if I succeed on that the change in the legal relationship "which I have brought about under s. 11 by my own act is "going to be cancelled." It seems to me that a landlord must make up his mind what his attitude is going to be, and that the statute gives him time in which to do it. I cannot see that he should be allowed to inform his tenant that he is going to treat with him on one basis and afterwards turn round and take up an entirely inconsistent attitude. Further, as the effect of serving the notice to avoid disclaimer is to make the notice of disclaimer of no effect—and that must, I think, mean of no effect ab initio—if it were possible for the court to entertain a subsequent application under s. 6, I cannot myself see what subject-matter in the application would remain, because the notice, being of no effect, would be a nullity.

It is, I think, a confirmation of this view—if, indeed, confirmation be required, because I do not think there is any real doubt about the matter—that sub-s. 4 of s. 6 provides for the case where the landlord, having attacked the notice of disclaimer on the ground that the land was not unfit at the time of the notice, fails in his attack. In that case the court is given power to allow him an extension of time in which to serve a notice to avoid disclaimer. The landlord, therefore, who is bona fide alleging that the notice of disclaimer is bad because the premises are not unfit, and applies under s. 6 instead of serving notice to avoid disclaimer under s. 11, but fails under s. 6, will be given, in proper circumstances, an opportunity to serve a notice to avoid disclaimer, notwithstanding that the statutory period of one month has elapsed. That is a perfectly reasonable and businesslike arrangement and entirely protects the landlord acting bona fide if he chooses to attack the notice under s. 6 in the first instance. In my view, if, with those rights in front of him, the landlord chooses to take the step of serving a notice to avoid disclaimer, he cannot thereafter make an application under s. 6 for the relief which that section provides.

In the result the appeal must be allowed.

MACKINNON L.J. I agree. It would be wrong to suppose that the amendment allowed in the court below was merely to substitute a reference to s. 6 instead of s. 11 in the notice of November 29, and the consequent relief asked for. It was very much more than that. In truth, it amounted, not only to a verbal alteration in the notice of November 29, but also to granting the landlord permission to cancel the notice to avoid disclaimer, treating it as never having been given, and wiping out all the legal consequences that by virtue of the provision of the statute resulted from the service of that notice to avoid disclaimer. That, I think, is far beyond anything which it is within the jurisdiction of the learned judge to grant on the landlord's application.

GODDARD L.J. I agree.

Appeal allowed.

Solicitor for tenants: *Lucien Fior.*
Solicitors for landlord: *James Brodie & Co.*

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Ex parte BOLTON CORPORATION.

Emergency Legislation—Local government—Officers on war service—Refusal of local authority to make up war service pay to level of civilian remuneration—Reference of dispute by Minister of Labour to National Arbitration Tribunal—Whether dispute a "trade "dispute"—"Workmen"—Local Government Staffs (War Service) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 94), *s.* 1, *sub-ss.* 1, 2*—Conditions of Employment and National Arbitration Order,* 1940 (*St. R. & O.* 1940, *No.* 1305) *Part I., art.* 2 ; *Part V., art.* 7*—Industrial Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 69), *s.* 8.

By s. 1 of the Local Government Staffs (War Service) Act, 1939, local authorities are empowered to make up the remuneration of officers who cease to serve them to engage in war service in His Majesty's forces or civil defence to the level of the remuneration which those officers would have received if they had continued in their civil employment, after deducting the amount of their war service pay.

The Bolton Corporation decided by resolution not to exercise in their officers' favour the power given by the Act, and the Minister of Labour, acting under the Conditions of Employment and National Arbitration Order (St. R. & O. 1940, No. 1305), referred the dispute to the National Arbitration Tribunal constituted under Part I., art. 1, of that order.

The order contains in Part V., art. 7, the following definitions :— "'Trade dispute' means any dispute or difference between "employers and workmen, or between workmen and workmen "connected with the employment or non-employment, or the "terms of the employment or with the conditions of labour of "any person." "'Workman' means any person who has entered "into or works under a contract with an employer, whether the "contract be by way of manual labour, clerical work or otherwise, "be expressed or implied, oral or in writing and whether it be a "contract of service or of apprenticeship or a contract personally "to execute any work or labour."

These definitions are identical with definitions contained in the Industrial Courts Act, 1919.

On a motion by the corporation for an order prohibiting the tribunal from adjudicating on the dispute :—

Held, (per Viscount Caldecote C.J. and Tucker J., Atkinson J., dissentiente) that the definition of "workman" in the order was wide enough to comprise all the officers of the corporation ; (per Viscount Caldecote C.J., including those with professional, administrative, and technical duties) ; that, as there was a dispute between employers and workmen there existed a trade dispute within the order ; and that the reference to the tribunal was, therefore, intra vires the Minister.

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MOTION by the Bolton Corporation for an order prohibiting the National Arbitration Tribunal from adjudicating on a dispute between the corporation and the National Association of Local Government Officers.

In April, 1940, the Bolton Corporation decided not to exercise the power conferred on them by the Local Government Staffs (War Service) Act, 1939, to make to or in respect of their employees who had ceased to serve in a civil capacity in order to undertake war service, such payments as should not exceed the remuneration which they would have received if they had continued to serve in their civil capacity, after deducting therefrom the amount of their war service pay. On August 20, 1940, the National Association of Local Government Officers, acting on behalf of such of its members as were employed by the Bolton Corporation, who had contended that it should be a condition of service of officers in the employment of the corporation that in the event of their serving in His Majesty's forces or in civil defence they should have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation, notified to the Chief Conciliation Officer of the Ministry of Labour and National Service, under Part I., art. 2, para. (1.) of the Conditions of Employment and National Arbitration Order, 1940 (St. R. & O. 1940, No. 1305) that there was in existence a trade dispute between the corporation and the members of the association employed by the corporation. Further efforts to settle the matter having failed, on February 4, 1941, the Minister of Labour referred the dispute to the National Arbitration Tribunal set up by the order. The reference came before the National Arbitration Tribunal on February 27, 1941, when a preliminary objection was taken on behalf of the corporation that there was not in existence a "trade dispute" within the meaning of the definition contained in Part V., art. 7, of the order, and that, therefore, the Tribunal had no jurisdiction. The Tribunal took the view that, the matter having been referred to them by the Minister, they could not be called on to determine the question of jurisdiction, which must be decided in the appropriate way in

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the High Court. They, therefore, adjourned the reference. The corporation, having on March 3 obtained leave, now moved for an order of prohibition.

Sydney G. Turner K.C. and *Neep* for the corporation.

The National Arbitration Tribunal has no jurisdiction to entertain the arbitration. There is no "trade dispute" within the definition of the words in Part V., art. 7, of the order. The jurisdiction of the Tribunal cannot be extended by the reference of the Minister of Labour. Secondly, there is in fact no trade dispute, for the corporation do not carry on a trade in the ordinary sense. Local authorities are expressly included in Part V. of the order, and the inference is that they would not be so included if they were regarded as carrying on a trade or industry for the purposes of Part I. In the Workmen's Compensation Act, 1925, s. 48, sub-s. 2, it is expressly provided that "the exercise and performance of the powers "and duties of a local or other public authority shall, for "the purposes of this Act, be treated as the trade or business "of the authority." There is no such provision in this order, or, indeed, in the Trade Disputes Act, 1906. The dispute must be one between employers and workmen or between workmen and workmen, and the term "workmen" is distinct from "officers." An "officer" is defined in the Local Government (Superannuation) Act, 1937, s. 40, as one whose duties are "wholly or mainly administrative, professional, or clerical," or "whose remuneration is at a rate greater than 250*l.* per "annum and is not an employed contributor within the National "Health Insurance Act, 1936." In this order "a workman" is defined as "any person who has entered into or works under "a contract with an employer, whether the contract be by "way of manual labour, clerical work or otherwise." This definition does not include the officers who are here concerned, for the words "or otherwise" must be construed ejusdem generis. Thirdly, the dispute does not relate to a term of the employment, but to an ex gratia payment after the employment has ceased. Local authorities are empowered to appoint officers at a "reasonable remuneration" by the Local Govern-

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ment Act, 1933, but the power to pay that remuneration ceases when an officer leaves the service of the local authority, whether to engage in war service or otherwise. Sect. 1 of the Local Government Staffs (War Service) Act, 1939, gives local authorities a discretion to make up the remuneration of officers who engage in war service to what they would have received if they had remained in civil employment, but that discretion is limited to making a grant under the Act to each individual officer on his leaving the service of the local authority after the circumstances of his particular case have been reviewed. If it were made a condition of the service of all officers employed by the corporation that, in the event of their serving in His Majesty's forces or in civil defence, they should automatically receive a grant, the corporation would not be exercising their discretion under the Act, but would be exceeding the powers given them thereby.

Sir William Jowitt S.-G. and *Arthian Davies* for the Minister of Labour. The Minister adopts a neutral attitude. The order (Part I., art. 2, para. 1) declares that the decision of the Minister whether a dispute has been reported is to be conclusive. The definition of a trade dispute in the order is not that it "includes" but that it "means any dispute or difference between employers and workmen . . . ." *Gough* v. *Gough* (1) was referred to. The term "officer" must not be interpreted too meticulously, and it is used in a different sense in different Acts. Unless limited by statute the term "servants" includes officers. To give the Tribunal jurisdiction the dispute must concern workmen, and the words "or otherwise" do not limit the term on the ejusdem generis rule, because there is no genus to which they can particularly apply. Even if officers are to be distinguished from workmen in the award, there is no ground for prohibition at this stage. As to "dispute . . . . connected with . . . . the terms of the employment" it is hard to see why this should not extend to future payments, and, if so, the terms must form part of the contract between the corporation and its servants or else must rest on statutory authority. The Local Government Staffs (War

(1) [1891] 2 Q. B. 665, 674.

Service) Act, 1939, in effect, empowered the corporation to make a gratuitous payment to its officers and there is nothing to prevent the corporation agreeing with its officers that on the happening of that event they shall receive the gratuity.

Spens K.C. and *C. Erskine Simes* for the National Association of Local Government Officers. The dispute is between the corporation and its servants and is connected with the terms of employment, and it is, therefore, properly referred to the Tribunal for decision. As to the jurisdiction of the Tribunal the reference by the Minister is conclusive. The definition of "trade "dispute" in this order is the same as that in the Industrial Courts Act, 1919, and it must be given its full meaning. It is clear that the relations between local authorities and their workmen in respect of the ordinary functions of the authority are included in Part III. of the order (Recognized terms and conditions of employment) and Part IV. (Departures from trade practices), and it would be very surprising if Part I. (National Arbitration) did not also apply to such employers and their officers. There is nothing in the Industrial Courts Act, 1919, to indicate that a dispute between a local authority and its employees in any capacity is outside that Act. As to the question whether "officers" are included in the definition of "workman," local authorities carry on certain trading or semi-trading functions and it cannot be said that the officers whom they employ in carrying out those functions do not come within the definition.

[ATKINSON J. You concede that the fact that a person is an officer of the corporation does not necessarily make him a workman within the definition in the order?]

Certainly, although it would be extremely difficult to say which officer was a workman and which was not. Every individual who is working under a contract of service, or who has contracted personally to execute any work or labour, is a "workman" within the definition. His contract may be "otherwise" than by way of manual labour or clerical work.

[ATKINSON J. Then you do depend on the words "or "otherwise" in the definition?]

Yes, for a few individual cases. Without those words it might not be possible to include certain senior officers. Those principally concerned, however, are the hundreds of officers who are clearly within the definition. The Court should assume that the reference is within the terms of the order, and unless it is satisfied that no "workmen" are concerned in it, the Court should hold that that reference is good and dismiss the motion. The award of the Tribunal must be confined to those who come within the definition of "workman" and if the award should include individuals who are thought not to be workmen the corporation can then take the proper steps to challenge the award.

Turner K.C. in reply. The minute of reference says that "the dispute arises out of a claim that it shall be a condition "of service of officers of the corporation," etc. The scope of the reference, therefore, on its face, covers all the officers of the corporation, without considering whether or not they come within the compass of workmen. Para. (5) of art. 2 of the order says that an "award made by virtue of "the foregoing provisions of this article shall be binding on the "employers and workers to whom the award relates." The award, if given in the wide terms of the minute, will relate to every officer without qualification—officers who are workmen and officers who are not.

Cur. adv. vult.

1941. March 18. The following judgments were read.

Viscount Caldecote C.J. An order of prohibition is sought on behalf of Bolton Corporation to prohibit the National Arbitration Tribunal from adjudicating on a dispute between the corporation and the National Association of Local Government Officers (which I will call "the association.") The dispute was referred for settlement to the Tribunal by the Minister of Labour and National Service, in purported exercise of powers conferred on him by Part I., art. 2, of the Conditions of Employment and National Arbitration Order, 1940 (St. R. & O. 1940, No. 1305). If this order does not authorize the reference by the Minister of Labour the order of prohibition must issue. It is not surprising that the applicants should scrutinize the order closely to see whether they are under an obligation to have the dispute

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in question referred, whether they will or no, to the Tribunal, with all the possible consequences. While it is important and, indeed, essential, that Ministers should not be hampered in the full exercise of the powers entrusted to them under the authority of Parliament in the present emergency, it is no less important to see that those powers are not exceeded.

The Conditions of Employment and National Arbitration Order, 1940 (which I will call " the order ") was made by the Minister of Labour and National Service by virtue of the powers conferred on him by reg. 58 AA of the Defence (General) Regulations, 1939. Those regulations were themselves made by Order in Council under powers conferred on His Majesty by the Emergency Powers (Defence) Act, 1939. No question is raised as to the validity either of reg. 58 AA or of the order. The questions which arise are wholly concerned with the interpretation of the order.

Under Part I., art. 2, of the order the Minister has power to refer, in certain circumstances, what is called a " trade "dispute " to the Tribunal constituted by him under Part I., art. 1, of the order. The Minister has no power to refer to the Tribunal any dispute other than a " trade dispute." It is unnecessary for the purposes of this judgment to repeat at length the provisions of art. 2 of the order. The dispute arises, according to the Minister's minute of reference, out of a claim by the association " that it shall be a condition of service of "officers in the employment of the corporation that in the "event of their serving in His Majesty's Forces or in Civil "Defence they shall have made up to them the difference "between their new pay and the remuneration which they would "have received if they had remained in the actual service "of the corporation."

The precise meaning to be assigned to the word " officers " in the claim of the association was debated in the course of the argument. We were referred to a definition of " officers " to be found in the Local Government (Superannuation) Act, 1937, s. 40, but this is a definition of the word " in this Act," and throws little, if any light, in my opinion, on the sense in which the word is used in the Minister's minute of reference.

The association was regarded by the Minister and by the corporation, for the purposes of the dispute, as representing the members of the association who are servants of the corporation. The association seems, as its full title suggests, only to admit to membership persons who may be described as local government officers. If, in the event of the arbitration proceeding, it were to be found that some members of the association are not " officers " within the meaning of the Minister's minute of reference, they would not be included in the arbitration.

In the first place, it is necessary to consider whether there is a " trade dispute." The order contains a definition of " trade "dispute." The expression may seem inapt to describe a dispute between a corporation and persons having annual salaries of several hundred pounds as some of the officers have. The first submission of counsel for the corporation was that a trades dispute must be a dispute in a trade, using the word " trade " in its ordinary sense. The corporation, counsel said, does not carry on a trade, and, therefore, no trade dispute exists. This would have great force if it were not for the definition, but I think the argument fails for the reason that the expression must be taken to have the meaning assigned to it by the definition contained in Part V., art. 7, of the order and no other meaning. It is the same definition as is to be found in the Industrial Courts Act, 1919. This follows from the language of reg. 58 AA, which provides that " trade dispute " shall have the same meaning as in the Industrial Courts Act. The definition is as follows : " ' trade dispute ' means any dispute or difference "between employers and workmen, or between workmen and "workmen connected with the employment or non-employment, "or the terms of the employment or with the conditions of "labour of any person." In applying that definition it is necessary to consider the meaning given to the word " workman." In the order it has the meaning ascribed to it in the Industrial Courts Act, 1919. The definition is as follows : " ' workman ' means any person who has entered into or "works under a contract with an employer whether the "contract be by way of manual labour, clerical work, or other-"wise, be expressed or implied, oral or in writing, and whether "it be a contract of service or of apprenticeship or a contract "personally to execute any work or labour."

I observe that there are some persons who are "workmen" within the latter definition and yet are capable of being members of the association—such persons, for instance, as have a contract with the corporation "by way of clerical work." This appears from the rules and constitution of the association, and from an exhibit to the affidavit of the deputy town clerk of Bolton. As to these persons there will clearly be a "trade "dispute" within the meaning of the order, between them (or the association acting on their behalf) and the corporation. There are, however, we were informed, other servants of the corporation who have professional, administrative, or technical duties, and the question arises whether such persons come within the word "workman" as defined. As to that I am of opinion that the definition of "workman" is wide enough to include employees who form the professional or technical or administrative staffs, as well as the clerical staffs. It is, I agree, a strained and unnatural meaning, but it is the meaning given by the definition. Any persons working under a contract of employment with the corporation, even though they perforn neither "manual labour" nor "clerical work," I think, come in by reason of the words "or otherwise." This, again, is a clumsy expression in this context, but I think its meaning is plain. It was argued that the words "or otherwise" must be construed ejusdem generis with "manual labour" and "clerical "work." I do not accept this interpretation. In this definition I think "or otherwise" is intended to be the antithesis of the two immediately preceding expressions. The sentence is to be read as if it said "whether by way of manual labour, "clerical work or some duty which is neither manual labour nor "clerical work."

For these reasons I have formed the opinion that all the servants of the corporation are "workmen" for the purposes of the definition of "trade dispute," and, inasmuch as there is admittedly a dispute, and as, in my opinion, it is a dispute between employers and workmen, I think there is a "trade dispute," subject, however, to a further point taken by counsel for the corporation.

The definition of "trade dispute" requires the dispute to be "connected with the employment or non-employment, "or the terms of the employment or with the conditions of "labour of any person." It was submitted that the claim of the association, and, therefore, the dispute, were not within any of these words, and that the only possible part of this sentence which could be prayed in aid by the association is the expression "the terms of the employment . . . . of "any person." I agree that these are the material words. The submission made by counsel for the corporation was that the claim dealt with the pay of the persons concerned after they ceased to be in the service of the corporation, and was, therefore, not connected with the terms of their employment by the corporation. This argument rested in part on a provision contained in an Act of Parliament passed almost immediately after the outbreak of the present war, namely, the Local Government Staffs (War Service) Act, 1939, and in part also on an expression in s. 14 of the National Service (Armed Forces) Act, 1939, where it is stated to be the duty of any employer in the circumstances named to "reinstate" a former servant who left to take war service. By s. 1 of the first of these two Acts a local authority was empowered to pay to a person who was, in the words of the schedule, an "employee "of a local authority otherwise than in war service" a sum which should not exceed the remuneration which he would have received if he had continued to serve in his civil capacity, after deducting therefrom the amount of his war service pay. This enactment was relied on to enforce the contention that, as the claim of the association was that the persons concerned should receive remuneration after they had ceased to serve the corporation in their civil capacities, it was, therefore, not connected with the terms of their employment by the corporation. It is not an argument which I can accept. A decision by the corporation to make a fresh contract of employment with their servants that they would make up their war pay to the level of their remuneration received while continuing to serve in their civil capacity seems to me no different in principle from a decision of the corporation to engage a servant on the terms that, on ceasing to be in their service, he would be paid a lump sum, or an annual sum for a term of years or for life, subject to any conditions which might be agreed.

In the present case it is suggested by the association that a condition should be imported into all the contracts of employment of workmen in the service of the corporation. I express no opinion whatever as to the reasonableness of such a proposal or as to the extent to which it should be made to apply. These are matters for the Tribunal, if and when the dispute comes to the Tribunal for settlement, but that the terms of employment of a servant of the corporation may, as a matter of words, include a term to the effect suggested, even though it only operates after the employment has come to an end, is, I think, clear. This observation disposes also of the argument based on s. 14 of the National Service (Armed Forces) Act, 1939.

One further objection was taken by Mr. Turner on behalf of the corporation, namely, that the corporation were unable to go beyond the discretion which the Local Government Staffs (War Service) Act, 1939, gave them to make up the war service pay of their employees on leaving their employment, and that if the Tribunal were to decide that the suggested term should be a condition of service of persons in the employment of the corporation the decision would have the effect of depriving the corporation of their discretion. Moreover, it was said that it would have the effect of making an ex gratia payment to a number of persons, and in any case the payment would be more than the reasonable remuneration which, apart from the Local Government Staffs (War Service) Act, 1939, was all that they were entitled to pay (see Local Government Act, 1933, s. 106, sub-s. 2). This seems to me to be another presentation, or an expansion, of the argument I have already discussed on the meaning of the phrase "terms "of the employment." Assuming, as I think I am entitled to assume, as a consequence of the Local Government Staffs (War Service) Act, 1939, that it is proper for a servant of the

Viscount Caldecote C.J.

corporation to receive the payments in question after he leaves their service to perform war services, whenever the corporation decide so to exercise their discretion, I see nothing irregular, or in excess of the powers of the corporation, if they bind themselves, or are required by the award of the Tribunal to bind themselves, in advance, to make similar payments. It is true this means giving up their discretion. Compulsory arbitration has not always been approved as a method of settling disputes, but if a party to a dispute is forced to submit his case to arbitration, it is very likely that he will be deprived of a right which he would otherwise have of deciding the matter in issue for himself. As for the question whether such payments would be more than reasonable remuneration, if it be assumed that the Tribunal would approve the claim, that could only be on the ground that the payment ensuing was justifiable as part of the reasonable remuneration of the servant. What is reasonable remuneration is a question of fact.

On the whole case it has to be remembered that this order, and the procedure it provides, were designed with a view to prevent the interruption of work by trade disputes. The order goes back for its ultimate sanction to the wide language of s. 1 of the Emergency Powers (Defence) Act, 1939. The defence of the realm, the efficient prosecution of the war, and the maintenance of services essential to the life of the community, are vital interests, and disputes of the nature called trade disputes in the order are admittedly incidents which in these interests it is desirable to prevent. If there is such a dispute in which neither party to the dispute will yield, arbitration is the remedy here provided. There is no reason to suppose that this tribunal will act either unreasonably or illegally, or that it will make an award on a dispute affecting persons who are not " workmen " and therefore not properly within the scope of the order. If there is a trade dispute of a nature covered by the order, as I think there is, then whatever difficulty there may be in identifying the individual persons or classes of persons involved in this dispute the Tribunal should not be prohibited from entertaining it. In my opinion, this application should be refused.

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ATKINSON J. This is a motion on behalf of the Bolton Corporation to prohibit the National Arbitration Tribunal from adjudicating on a dispute between the National Association of Local Government Officers and the corporation, which has been referred to the Tribunal as a trade dispute by the Minister of Labour under Part I., art. 2, of the Conditions of Employment and National Arbitration Order, 1940. The dispute arises out of a claim that it shall be a condition of service of officers in the employment of the corporation that, in the event of their serving in His Majesty's forces or in civil defence, they shall have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation. The grounds on which the motion is based are, broadly, that the dispute is not a "trade dispute" within the order, and that the claim is for something which the corporation has no power to concede.

The power of a borough council to appoint officers is to be found in s. 106 of the Local Government Act, 1933. "(1.) The "council of every borough shall appoint fit persons to be town "clerk, treasurer, surveyor, medical officer of health and "sanitary inspector or inspectors and shall also appoint such "other officers as the council think necessary for the efficient "discharge of the functions of the council. (2.) . . . . the "council may pay to an officer appointed under this section "such reasonable remuneration as they may determine, and "subject as aforesaid such officer shall hold office during the "pleasure of the council." An officer is, therefore, someone appointed to assist in the efficient discharge of the functions of the council, and the power of the council as to remuneration is limited to paying to an officer (not to someone who has ceased to be an officer) such reasonable remuneration as they may determine. The definition of an officer in the rules and constitution of the association is in harmony with the statutory meaning.

[His Lordship read s. 1 of the Local Government Staffs (War Service) Act, 1939, and summarized the facts, and continued:] The claim, therefore, is on behalf of all officers actually employed by the corporation on February 4, 1941, who are members of the association. Reg. 58 AA of the Defence (General) Regulations, with a view to preventing work being interrupted by trade disputes, empowered the Minister of Labour by order to make provision "(*a*) for "establishing a Tribunal for the settlement of trade disputes, "and for regulating the procedure of the Tribunal." The regulation provided that "In this regulation the expression "'trade dispute' has the same meaning as in the Industrial "Courts Act, 1919." In pursuance of the regulation the Minister made an order on July 18, 1940, to come into force on July 25, 1940. By Part I. the order constitutes a tribunal called the National Arbitration Tribunal to determine such trade disputes as the Minister shall refer to it. Such a reference is compulsory where steps to promote a settlement have failed. Part III. provides that when in a trade or industry there are terms and conditions of employment recognized by substantial proportions of employers and workmen all employers in the trade or industry shall observe them. Part IV. deals with departures from trade practices. Part V. contains the definitions of "trade dispute" and "workman" which have been read. They are taken from the Industrial Courts Act, 1919.

As the Defence Regulation 58 AA provided that the expression "trade dispute" had the same meaning as in the Industrial Courts Act, 1919, it is necessary to determine what the definitions mean in that Act. The title of the Industrial Courts Act, 1919, indicates the purpose of the Act. It is now settled law that the title of a statute is an important part of the Act and may be referred to as indicating the general scope, and thus throw light on the construction of the Act (see per Lindley L.J., in *Fielding* v. *Morley Corporation* (1), and Lord Macnaghten in *Fenton* v. *Thorley & Co., Ld.* (2). The title describes the Act as "An Act to provide for the establishment "of an Industrial Court and Courts of Inquiry in connection "with Trade Disputes, and to make other provision for the "settlement of such disputes," and to continue certain

(1) [1899] 1 Ch. 1, 3.

(2) [1903] A. C. 443, 447.

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provisions of the Wages (Temporary Regulation) Act, 1918. Part I. of the Act of 1919 provides that for the settlement of trade disputes there shall be a standing industrial court. Part II. provides that the Minister (and the Minister referred to is the Minister of Labour) may refer any matters appearing to him to be connected with the dispute to a court of inquiry. Part III. continues certain provisions of the Wages (Temporary Regulation) Act, 1918, which provided for prescribed rates of wages for workmen employed in any trade or industry. There was no definition depriving these words of their ordinary meaning. It is, therefore, clear that the three operative parts of the Act of 1919 were concerned only with trade and industry. Part IV. contains the two definitions in question. If there were no definition of "trade dispute," I imagine that most people would take the words to mean a dispute connected with trade between persons engaged in trade or in a trading operation, whether between one trader and another trader, or between a trader and his men, or between men and men. Certainly no one could have had any doubt but that the intention of the legislature was to provide for disputes connected with trade and industry and nothing else. The legislature, however, did not intend to go so far even as that. It did not intend industrial courts to be used for settling disputes between one trader and another trader, and, therefore, a definition of "trade dispute" so framed as to exclude trade disputes of that kind and make it clear that a trade dispute was limited to a dispute between the trader and his men, or between men and men, was necessary. Further, the nature of the dispute was to be limited. It must concern only, as between employer and men, the terms of employment or the conditions of labour.

There are two words in the definition of "trade dispute" to be construed—"employers" and "workmen." There is no definition of "employers." It is said for the association that the word should be given the widest interpretation possible, that the words "industry" and "trade" which occur again and again throughout the Act like a recurring decimal must be ignored, that Parliament meant by a mere definition to revolutionize the whole relationship of master and servant so far as terms of employment were concerned—in short, that the word "employers" covers everyone from the woman with a lady's maid to the London, Midland and Scottish Railway. On the other hand, it is argued that the Act was concerned with industry and trade and nothing else; that the object of the definition was to define what kind of trade dispute was within the Act, that the only employers referred to are employers engaged in trade, and that the only disputes referred to are certain limited classes of "trade "disputes."

There is the same divergence of view as to the proper construction of the definition of "workman." The council say that it is controlled by a true interpretation of a "trade "dispute." The association say that it embraces every person working under a contract of service whatever the nature of the service. If that had been the intention of Parliament there was no need to go beyond the first two lines of the definition, but the definition continues: "whether the contract "be by way of manual labour, clerical work or otherwise." Manual labour and clerical work are fairly descriptive of the main services rendered by workmen and workwomen in industry, and the word "otherwise" might reasonably cover such other services as are there rendered, but the respondents contend, and their view forces them to contend, that this one word "otherwise" was inserted, albeit regardless of grammar, to include in the expression "workman" everyone rendering under a contract of service, professional services (as, for example, doctors, solicitors, accountants, teachers and nurses), administrative services, and technical services (such as those rendered by managers of engineering works, electrical supply works, designers, borough engineers, sanitary and food inspectors), artistic services (such as curators of galleries and museums, actors and chorus girls), political services, domestic services, and even the services of such an austere person as a bank manager. I cannot believe that, if all these services were intended to be covered by the definition, the

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only two to be specifically mentioned would be the two which least required mentioning.

The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded according to the intent of them that made it. The first rule of construction for determining that intent is that, if the words are unambiguous and precise they must be construed in their natural and ordinary sense, and phrases and sentences must be construed according to the rules of grammar. This is called the rule of literal construction. Maxwell in his book on the Interpretation of Statutes has an interesting heading to a section dealing with this rule. It is "Fallacy of Literal "Construction." I cite a few passages from the section. "The rule is confined to cases where the language is precise "and capable of but one construction" (Can that be said of the word "otherwise" or the word "employers" in this definition ?) "or where neither the history or cause of the "enactment, nor the consequences to which the literal interpretation would lead, show that that interpretation does not "express the real intention." "It is another elementary rule "that a thing which is within the letter of a statute will "generally be construed as not within the statute unless it be "also within the real intention of the legislature." "General "words admit of indefinite extension or restriction according "to the subject to which they relate and the scope and object "in contemplation. To arrive at the real meaning it is always "necessary to get an exact conception of the aim, scope and "object of the whole Act." To quote Lindley L.J., in *In re Mayfair Property Company* (1): "In order properly to "interpret any statute it is as necessary now as it was when "Lord Coke reported *Heydon's* case (2) to consider how the law "stood when the statute to be construed was passed, what "the mischief was for which the old law did not provide, and "the remedy provided by the statute to cure that mischief."

The Industrial Courts Act was concerned with industry and trade. These two words dominate the Act. To construe the Act or any part of it as if those words were not there is, in my judgment, wholly wrong. To construe the word "employers" as meaning every employer of any kind, a "trade dispute" as including disputes having nothing to do with trade or industry, and the adverb "otherwise" as embracing every branch and kind of service other than manual labour and clerical work, would be to give the Act a scope and effect which I am convinced the legislature never contemplated for one moment.

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(1) [1898] 2 Ch. 28, 35.

(2) (1584) 3 Co. Rep. 7*a*.

I agree with Mr. Turner that the dispute here is not a trade dispute within the meaning of the Act of 1919 or reg. 58 AA. Sect. 10 of the Act presents no difficulty. It merely means that if the Crown through a Government Department employs workmen in industrial undertakings, as, for example, in dockyards and arsenals, the Crown shall be within the Act. A local authority is expressly brought within Part III. of the order by a further definition of "trade or industry" in Part V. That definition is: "'Trade or industry' includes the performance of its functions by a public or local authority." I cannot find anything in the regulations under which the order was made which enables the Minister to declare that the performance of its functions by a local authority is that which it is not—a trade or industry, but, be that as it may, the obligation sought to be imposed by Part III. is to observe recognized terms and conditions of employment as therein defined. The attempt here is to get an award to impose terms on the corporation regardless of whether they are recognized terms or not.

Mr. Turner next dealt with the question whether the dispute was connected with the terms of employment. He says that the corporation have statutory power to pay their officers reasonable remuneration. That means remuneration for services which are being rendered. It does not include a power to pay anything to people who have ceased to be officers. The Local Government Staffs (War Service) Act, 1939, recognized this limitation, and, therefore, gave a corporation power to make up the war service pay of a servant undertaking war service and so ceasing to serve the local authority to a sum equal to the remuneration he would have received if he had continued to serve. It is said that any such payment is and must remain discretionary. On this he bases two contentions. The first is that the question whether or not a corporation should or ought to exercise this power is not a dispute connected with the terms of the employment of the persons concerned. The second is that, even if he is wrong about that, the National Arbitration Tribunal cannot be asked to award that the corporation shall agree to terms of employment which are beyond their statutory powers.

The short argument in support of the first contention is that a term which is to relate to a period after the employment has ceased cannot be a term of the employment. As to the second contention, it is said that the power given by the Act of 1939 is discretionary, that the discretion is to be the discretion of the corporation and can be exercised only after the employment has ceased and the officer has undertaken war service, and that a proper exercise of discretion involves a consideration of all the circumstances of each particular officer and the interests of the ratepayers. Further, it is said, the payment must be gratuitous throughout the whole period involved. For instance, an unmarried officer, if housed and fed by the State, would be far better off than ever if his salary were made up, whereas a married man with a household and family to maintain would not.

I do not agree with the contention that a contractual promise to make payments after a service has ceased cannot be said to be a term of the employment. If, to retain a servant in its employment, a local authority agrees to make certain payments after the employment has ceased, it seems to me that that promise is one of the terms on which the servant is employed, but I agree with the second contention that such a term is one which the corporation cannot be compelled to agree to against their own judgment. The making up of salary after service has ceased certainly cannot be regarded as within the power to pay reasonable remuneration to an officer. The payment is not remuneration, nor is it payment to an officer. Such a payment can be made legally only under s. 1 of the Act of 1939. That section authorizes gratuitous payments to be made in the discretion of the corporation.

It was urged by the Solicitor-General that, if a local authority has power to make a payment, it must also have power to contract to make it. I think that is right so long as the agreement is itself an exercise of the discretion of the local authority. It seems to me that the power to pay or to agree to pay is a power to pay or agree to pay if, and only if, the local authority think it right so to do in the exercise of their discretion. Neither the regulations nor the order can confer on the National Arbitration Tribunal the power to substitute its discretion for that of the corporation and to compel the corporation to incur contractual obligations to make payments which it thinks ought not to be made. The corporation, not the National Arbitration Tribunal, are the statutory guardians of the money of the ratepayers. It is for them, and them alone, to say when and how that money shall be spent.

In my view, the order of prohibition should issue upon both the grounds that I have indicated.

TUCKER J. The grounds of this application were summarized in the argument of counsel for the corporation as follows : The jurisdiction of the Tribunal is confined to "trade "disputes" as defined in reg. 58 AA of the Defence (General) Regulations, 1939, and there is here no "trade dispute" within the meaning of that definition, because :—(1.) there is no dispute "in a trade," not, as I understand the argument, on the ground that the corporation are not traders, but on the ground that these particular employees who are said to consist of persons engaged in administrative, technical or clerical duties, cannot be described as engaged "in a trade" ; (2.) some, at any rate, of the officers concerned are not "workmen" within the meaning of that word in the definition ; and (3.) the claim does not relate to "terms of employment" but to ex gratia payments after employment has ceased. I think, however, that the argument of counsel for the corporation involved a further distinct ground which may be stated as follows: "The Tribunal is being asked to make an "award which will compel the corporation contractually to "assume an obligation towards its officers as a whole which "it has no power to undertake, it being limited by statute to "making ex gratia payments in its discretion to officers who "have ceased to be in its service." In my view, this is a ground distinct from ground (3.), and I call it for convenience ground (4.) and will return to it later when I have dealt with Nos. (1.), (2.) and (3.).

[His Lordship read reg. 58 AA and Part V., art. 7, of the order and continued:] In my view, it is important to bear in mind that we are dealing with a war-time regulation made to prevent work being interrupted by trade disputes in a time of national emergency, and with this end in view it is not surprising to find that the definition of "trade dispute" which is taken from the Industrial Courts Act, 1919, and adopted in reg. 58 AA, is in very wide terms. The language is plain, and I can see no necessity for looking elsewhere than at the words themselves to ascertain their meaning. They are unambiguous, and it cannot, in my view, be said that to give them their natural and ordinary meaning would produce results which could not have been intended by those who framed this regulation. I can, moreover, find nothing in the other parts of the Industrial Courts Act, from which the definition is taken, or in the order, which must of necessity restrict the language to disputes arising "in a trade." I think the draftsman has deliberately used very wide language which is apt to include any dispute of the kind referred to which arises between employers and workmen, whether or not the workmen are engaged in a trade. In my view, therefore, ground (1.) fails.

As to ground (2.), there is in my opinion nothing in the evidence before us to show that the Tribunal is being asked to adjudicate on the claims of persons who are not "workmen" within the meaning of the definition of "workman" in the order. The affidavit of the deputy town clerk shows that there are 317 "officers" of military age employed by the corporation, but not engaged on war service. There is nothing to indicate the nature of the work being performed by these men, or to show that their employment is of such a nature that they cannot be described as "persons who have entered into or "work under a contract with an employer, whether the "contract be by way of manual labour, clerical work or "otherwise." It may be that when this dispute comes before the Tribunal for adjudication, the evidence will show that all or some of the 317 persons described as "officers" are not workmen within the meaning of the definition, and as to such persons the Tribunal will, no doubt, refuse to make any award, but in my view the mere fact that they are described as "officers" is not a sufficient ground upon which this Court can say, at this stage, that it is satisfied that the Tribunal is being asked to adjudicate in a dispute between the corporation and persons all—or some identifiable number of whom—cannot be workmen within the meaning of the definition. Speaking for myself, I do not find it possible, on the material before the Court, to express any view whether such of the officers as may be proved in the course of the arbitration to be performing administrative or technical duties, may or may not come within the definition of "workman." In my view, this ground also fails.

As to ground (3.), it is argued that an agreement to pay money to or to confer any other benefit on an employee after he has left the service of his employer is not a matter "connected with .... the terms of his employment," even if the agreement is made at the time of his engagement or during the currency of his employment and in consideration of his continuing to serve. It is said that such a payment or benefit can only be "connected with .... the terms of the "employment .... of any person" if it is received during the currency of the employment. I can see no reason for giving these words such a restricted meaning. It appears to me that if an employer and employee make it part of the contract between them that the employer shall confer some benefit on the employee on the termination of his service, or on his dependants at his death, such provision is clearly a matter "connected with the terms of the employment" of the employee. I think that this ground also fails.

There remains the ground which I have called (4.), as to which I confess I have felt some doubt. Mr. Turner, for the corporation, contends that the only authority for the corporation to make up the pay of its officers after they have left and gone on war service is to be found in the Local Government Staffs (War Service) Act, 1939. [His Lordship read s. 1, sub-ss. 1 and 2, of the Act.] He says that this Act merely confers on the corporation a power to make ex gratia payments in its discretion to persons after they have ceased to serve the corporation. Without such legislation the corporation—unlike a private individual—could not use their money in this way. This was, I think, conceded by the respondents, but the argument advanced by the Solicitor-General, on behalf of the Minister, was that this Act having empowered the corporation to make a present, and placed it in the same position as the private individual, there was nothing to prevent the corporation from binding itself contractually to do that which it was empowered to do voluntarily, and he further contended that, apart altogether from the Act of 1939, the corporation had complete freedom with regard to its contracts with its employees.

Mr. Turner's answer to this was that the powers of the corporation as to the employment of its officers and other servants is solely derived from and regulated by statute, namely, the Local Government Act, 1933, and the Local Government (Superannuation) Act, 1937. The statutory power to make such contracts is contained in s. 106 of the former Act, which provides in sub-s. (2.) as follows: "Subject, "as respects the offices of medical officer of health and sanitary "inspector, to the provisions of this Part of this Act, the "council may pay to an officer appointed under this section "such reasonable remuneration as they may determine, and, "subject as aforesaid, every such officer shall hold office "during the pleasure of the council," and, for the purposes of that Act, the definition of "officer" includes a servant. Mr. Turner contends that before the Local Government

Staffs (War Service) Act, 1939, if the corporation had contracted under s. 106 of the Local Government Act, 1933, to pay its employees after they had left for war service they would have been liable to be surcharged on the ground that "reasonable remuneration" under that section could not be construed to include such payments, and that, having regard to the statutory position of the employees of local authorities, "reasonable remuneration" within the meaning of s. 106 of the Local Government Act, 1933, must be restricted to payments or other benefits to be received by employees during the currency of their employment. I think that it may be correct to say that before the Act of 1939 the corporation might have been surcharged if they had made contracts with their employees for payment to them of remuneration after they had left their service and had proceeded to implement such contracts. But, when once they have been given statutory power in a certain event to make such payments gratuitously, I do not think they can be held to be acting unlawfully if they agree with their employees before the event arises that they will, on the happening of that event, exercise their statutory powers in their favour, or that an agreement to this effect would result in the payment of remuneration which would not be reasonable within the meaning of s. 106 of the Local Government Act, 1933.

For these reasons I agree with the judgment of the Lord Chief Justice that this application should be refused.

Application refused.

Solicitors for Bolton Corporation: *C. E. C. Browne, for Town Clerk, Bolton.*

Solicitors for National Association of Local Government Officers: *J. M. McDonnell, Jackson & Co.*

Solicitor for Minister of Labour: *Solicitor of the Ministry of Labour.*

A. W. G.

Note.—This decision was reversed by the Court of Appeal on July 23.—R. S.

1941
Mar. 10, 11.

WESTON *v.* LONDON COUNTY COUNCIL.

Factory — Woodcutting machine — Unfenced cutter — Technical institute —Pupil—" Employed in manual labour "—" Work carried on by way of trade or for purposes of gain "—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151, *sub-ss.* 1, 9.

A technical institute conducted by a municipal or public authority, such as the London County Council, for the training and instruction of pupils in work which involves the use of dangerous machines is not within the general definition of a factory in s. 151, sub-s. 1, of the Factories Act, 1937, nor included among the premises specified in that sub-section: nor has sub-s. 9 the effect of bringing such an institution within the definition of a factory.

Those who receive instruction in a technical institute are employed neither by those who own nor by those who teach in it, and are not engaged in any process for or incidental to any of the purposes set out in s. 151, sub-s. 1, whether by way of trade or for the purposes of gain or otherwise.

Action before Wrottesley J. without a jury.

The plaintiff, who was a wood-cutting machinist, aged 31, was a pupil at the Hackney Technical Institute. The defendants were the authority responsible for the care and upkeep of the institute and for the instruction given therein to the pupils, who were mainly adults.

In the institute was a vertical spindle machine for cutting moulded edges on wood, worked by electricity or other mechanical power. This machine was dangerous, but unfenced. On February 28, 1940, the plaintiff was shown by the instructor how to manipulate the machine and set the knives, and on the next day was shown how to reassemble it. His first attempt to do so was unsuccessful: the instructor pointed out what was wrong in the plaintiff's work, and directed him to do it again. This the plaintiff did, but after reassembling the machine he did not ask the instructor, who to his knowledge was within call, to come and see whether he had properly reassembled it, but proceeded to work upon it. In doing so he did not follow the instructions which he had received on the previous day but deliberately adopted a dangerous method against which he had been expressly warned. While he was thus engaged his right hand came into contact with a cutter forming part of the machine, and as a result the little finger of his right hand had to be amputated. The plaintiff alleged that the institute was a "factory" of which the defendants were the "occupiers" within the Factories Act, 1937, and that the accident was due to the defendants' negligence and/or breach of their statutory duties under the Act (1).

The particulars of alleged negligence were (inter alia)—(*a*) not fencing the machine and the cutter forming part thereof; (*b*) not maintaining such fencing in an efficient state; (*c*) requiring the plaintiff to work in a place and position which were dangerous or unsafe owing to the absence of secure or efficient fencing; (*d*) not instructing the plaintiff sufficiently in the working of the machine.

The defendants denied that the institute was a factory within the Factories Acts, 1937, and they alleged that the plaintiff's own negligence caused or contributed to the accident.

Weitzman for the plaintiff. The plaintiff is entitled to recover because this institution was a "factory" within s. 151, sub-s. 1, of the Factories Act, 1937, and dangerous machinery therein was not fenced as required by s. 14. Within s. 151, sub-s. 1, these were premises in which persons were employed in manual labour in making articles, and, as the premises belonged to or were in the occupation of a public authority, they were not prevented from being a factory by the fact that the work carried on therein was not carried on by way of trade or for purposes of gain: see s. 1, sub-s. 9. [He referred to *Wood* v. *London County Council* (1).] The defendants are also liable to the plaintiff on the ground that he was their pupil and they were bound to see that the appliances which they supplied for his tuition could be used safely.

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(1) The Factories Act, 1937, s. 151, sub-s. 1, provides: ". . . . "the expression factory means "any premises in which, or within "the . . . . precincts of which, "persons are employed in manual "labour in any process for or "incidental to any of the following purposes, namely: (*a*) the "making of any article . . . . or "(*b*) the altering, repairing, ornamenting, finishing . . . . of any "article; or (*c*) the adapting for "sale of any article; being "premises in which, or within ". . . . the precincts of which, "the work is carried on by way of "trade or for purposes of gain "and to or over which the employer of the persons employed "therein has the right of access "or control"; and sub-s. 9: "Any premises belonging to or "in the occupation of the Crown "or any municipal or other "public authority shall not be "deemed not to be a factory ". . . . by reason only that the "work carried on thereat is not "carried on by way of trade or "for purposes of gain."

In s. 154 provision is made for the appointment of inspectors of certain premises which are not factories, and the conditions are that the manual labour is exercised otherwise than for instruction and that the premises do not constitute a factory. It is to be deduced from this that a school for technical instruction may constitute a factory. The same argument arises from the provisions of s. 104, which deals with "institutions" that are not factories, and it is submitted that in the present case these premises do in fact constitute a factory.

Monier-Williams for the defendants. The plaintiff cannot recover. The premises in question are simply and solely an educational establishment. Such technical institutes have never been regarded as factories. They have never been inspected or made the subject of other supervisory measures under the Factory Acts as have factories in the generally accepted meaning of the term. If these premises constitute a factory, the workshop at every public school, where carpentry is taught, is a factory. Furthermore, factory legislation is designed to protect employed persons who are working under contracts of service. Throughout the Act of 1937 reference is made to "persons employed" in the factory, and in s. 151, sub-s. 1, itself occur the words "persons employed in "manual labour." In *Wood* v. *London County Council* (1) the plaintiff was a kitchen-maid employed by the defendants, and on that ground the case is distinguishable from the present. Here there was no "employer" within the accepted meaning of the term.

Neither under the Factories Act, nor at common law, has

(1) [1940] 2 K. B. 642.

the plaintiff any cause of action. As to the latter, the defendants were in no way guilty of negligence towards him, and even if there were negligence on the part of the instructor, which is not admitted, the accident was due to the carelessness of the plaintiff in acting contrary to his orders. Finally, the doctrine "volenti non fit injuria" applies. The plaintiff took the risk and both on this ground and on the ground of contributory negligence he cannot recover.

Weitzman in reply. Even if a learner uses a dangerous machine in a wrong way that will not be treated as contributory negligence. In *Murray* v. *Schwachman, Ld.* (1), the defendants (the employers) failed to provide a proper guard for the machine and there was a breach of the Woodworking Machinery Regulations, 1922. There the plaintiff, an infant, recovered although he himself was at fault under those regulations.

WROTTESLEY J. stated the facts above summarized, and after explaining in detail the construction of the machine, its use and the method of working it, and having found that the method adopted by the plaintiff at the time when he met with the accident was dangerous and contrary to the instructions that he had received, proceeded :—

The first question which arises is this: does the Factories Act, 1937, apply to this technical institute? If so, certain obligations are imposed upon the defendants in regard to fencing the machinery therein which were not fulfilled, for there is no doubt that this machine was not fenced at the time when the plaintiff sustained his injuries. Prima facie a technical institute is not a factory. But the Factories Act, 1937, applies to certain places which are not factories in the ordinary acceptation of the term. The general definition of a factory is to be found in sub-s. 1 of s. 151 of the Act, and I do not think that anyone could suggest that this institute falls within it. While it is true that manual labour takes place therein, I do not think that there are any persons, other than the instructor, "employed" in manual labour there, for "employed" does not mean "busy," "engaged" or

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(1) [1938] 1 K. B. 130.

"occupied," and further nobody is employed or engaged or occupied in any process which is for or incidental to any of the purposes set out in the sub-section, such as the making, altering or adapting of articles for sale, and certainly not in any work which is carried on "by way of trade" or "for "purposes of gain." The institute therefore is not "premises" within the general definition to be found under s. 151. But Parliament has thought right to subject premises which may not fall within that general definition to the various forms of control which are exercised over a factory and a list of special cases is set out in the sub-section, which continues: "And "(whether or not they are factories by reason of the foregoing "definition) the expression 'factory' also includes the "following premises in which persons are employed in manual "labour, that is to say (sub-clause X) any premises in which "mechanical power is used in connection with the making or "repair of articles of metal or wood incidentally to any "business carried on by way of trade or for purposes of gain." There being neither trade nor purpose of gain here, that special case, which seems to me to be the only one which comes anywhere near to being applicable to this case, cannot be said to cover a technical institute such as this.

I must now deal with the suggestion strongly urged by Mr. Weitzman that s. 151, sub-s. 9, is expressed in terms which clearly and expressly cover a technical institute of this kind. It is said that in dealing with the case of premises which are owned by a municipal or public authority, as these premises are, for it is common ground that the London County Council is either a municipal or a public authority, the general definition of factory should be read as if the words "the work "is carried on by way of trade or for purposes of gain" were struck out from it and if that be done these premises will be covered by the definition. I do not think that this is so for, as I have already said, I do not think any persons are employed in these premises in manual labour in any of the processes set out in that sub-section. The object and intent of sub-s. 9 is, I think, to cover the numerous operations of the Crown and public authorities, both of whom are great employers of labour carried on in premises owned or occupied by them, which would fall within the general definition were it not for the fact that they cannot properly be said to be carried on by way of trade or for the purposes of gain, and an instance of this is to be found in the case of *Wood* v. *London County Council* (1). The sub-section does not say that premises in the occupation of or belonging to a public authority shall be deemed to be a factory, but says that they are not to be excluded from the definition, if they comply with other particulars in the definition, merely because the work carried on in them is not carried on by way of trade or for the purposes of gain.

A school or college is not a factory and the scholars or pupils are employed neither by those who own nor by those who teach in the school. Nothing, I think, would have caused Parliament more surprise when discussing the merits and difficulties of the new factory legislation in 1937 than to be told that they were legislating for schools, colleges and technical institutes. There is much in the Factories Act, 1937, which is applicable to any place where work is done upon machines, but there are many other provisions in the Act which are as clearly inapplicable to schools or institutes. If it were necessary I could, I think, support this view by referring to sub-ss. 4 and 6 of s. 152, the latter of which deals with apprentices. Again s. 154 and possibly s. 104 tend to show that Parliament had not the intention of legislating for schools, but was not unwilling to provide some machinery whereby the operation of the Factories Act could be applied to certain institutions and premises which are not factories. I think that those sections support the view that Parliament did not intend to cover by the words "persons who are "employed" scholars, pupils and learners. It seems to me therefore that I have not to resort to the Factories Act in order to find out what is the duty of the London County Council in regard to a technical institute under its control and the pupils receiving instructions there, and I need not therefore consider the regulations nor the conditions of ss. 14 to 16 of the Act.

(1) [1940] 2 K. B. 642.

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I now come to the question whether apart from this Act the facts disclose a neglect of duty on the part of the London County Council towards the plaintiff. [His Lordship then reviewed the evidence and held that the defendants had not been guilty of negligence which would entitle the plaintiff to recover at common law, and that the accident had occurred owing to the plaintiff's own negligence in disobeying instructions. He concluded his judgment as follows:] It is said by Mr. Weitzman that those who teach the method of working an instrument of this kind should know that their first duty is to instruct the pupil how to use the guard, and that as a definite proposition: but I am certainly not going to say that those engaged in teaching the use of these dangerous machines are bound to obey the code as laid down in the Factories Act or under it with reference to guards, as if I did so instruction might be seriously hampered, if not stopped altogether. One has to bear in mind that admittedly here there was an instructor nearby ready to answer any questions which were put to him and to help the student by giving practical demonstrations to him and otherwise.

This accident came about, I think, because the plaintiff, instead of calling the instructor, chose to go on experimenting and in experimenting did the very thing, as he himself has told me, that he had been warned before the accident occurred not to do. I do not think the injury sustained by him was caused by the negligence of the instructor. I do not think that the instructor did anything which was unreasonable or careless or not up to the standard of duty imposed upon an instructor in a London County Council school. In these circumstances, therefore, I must give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Breeze, Benton & Co.*
Solicitor for defendants: *J. R. Howard Roberts.*

F. P. F.

Applied. ROBERTSON *v.* MINISTER OF PENSIONS. [1948] 2 All E.R. 767.

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Workmen's compensation—Industrial disease—Nystagmus — False representation on entering employment as to previous immunity—Workman becoming disabled by nystagmus—Agreement by employers to pay compensation—Subsequent discovery by employers that workman had previously suffered from nystagmus—Continuance by employers thereafter to pay compensation—Whether employers entitled to cease payment of compensation—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*b*).

The Workmen's Compensation Act, 1925, s. 43, sub-s. 1, enacts that where a workman is certified to be suffering from an industrial disease, " and the disease is due to the nature of any " employment in which the workman was employed at any time " within the twelve months previous to the date of the disable- " ment . . . . whether under one or more employers, he . . . . " shall be entitled to compensation under this Act . . . . " subject to the following modifications : . . . . (*b*) If it is proved that " the workman has at the time of entering the employment " wilfully and falsely represented himself in writing as not having " previously suffered from the disease, compensation shall not " be payable."

A workman entered the service of the employers as a coal miner on September 26, 1928, and re-entered it on September 18, 1933. On both occasions he made a representation in writing that he had not previously suffered from nystagmus. This representation was false and was found by the arbitrator to have been made wilfully. During his service with the employers the workman again contracted nystagmus, and on November 19, 1938, obtained the certificate from the certifying surgeon necessary to entitle him to compensation. The employers required the workman to be examined by a surgeon on their behalf and on that examination the workman disclosed the fact that he had previously suffered from nystagmus. The surgeon included in his report to the employers the workman's admission that he had previously suffered from the disease. The employers, without asking any further questions, paid the workman, who was wholly incapacitated, compensation at the full rate until June 8, 1940, when they ceased payment, giving as their reason for so doing that the workman was disentitled to compensation because of the false statement he had made on entering their service. The workman then commenced proceedings claiming compensation. The arbitrator found that the payment and receipt of compensation constituted a binding and concluded agreement whereby all questions of liability between the parties were settled, and he accordingly made an award in favour of the workman. On an appeal by the employers :—

Held, by the Court of Appeal, that the only inference that could be drawn from the payment of compensation by the employers to the workman was that the payment involved a recognition of liability to pay compensation by the employers and by implication an agreement by them that the workman was entitled to it. The consideration for such an agreement was the fact that the workman abstained from taking proceedings to obtain an award. An agreement to pay compensation had the same effect as an award, and employers could not, after a workman had obtained an award, subsequently rely upon the workman's misrepresentation which they had not set up as a defence to the workman's claim. In the same way employers could not upset an agreement to pay compensation on that ground.

Jamieson v. *St. Flanan Coal Co.* 1935 S. C. 138 followed.

Dicta of Lord Hailsham and Lord Thankerton in *Scott* v. *Summerlee Iron Co.* [1931] A. C. 37, 44, 51, not followed.

APPEAL from an award of the judge of the Thorne County Court upon an application for compensation under the Workmen's Compensation Acts.

The applicant, James Birch, was first employed in a coal mine at Nottingham for about thirteen years. He was then employed at Hemsworth by the Hemsworth Colliery Co. for about eleven years from 1915 to 1926. At some time during his employment at Hemsworth he was incapacitated by miners' nystagmus, but there was some discrepancy as to the number of attacks of this disease and the total duration of the incapacity. To Dr. Hargreaves, on November 23, 1938, he said: "I was off at Hemsworth twenty years ago for two "years." To his own counsel, Mr. Neil Lawson, he said at the hearing before the county court judge that he was disabled for three years by nystagmus at Hemsworth. In cross examination five separate certificates were put to him by Mr. Beney, counsel for the employers, dated October, 1916, August, 1917, January, 1919, November, 1921, and August, 1923, respectively, followed by periods of incapacity amounting in all to over seven years, and these he was unable to deny. The applicant entered the employment of the respondents at Thorne, on September 26, 1928, and on that occasion certain particulars were entered in the signing-on book by a clerk named Green employed by the respondents, and were signed by the applicant. These particulars included a statement that the applicant had not suffered from nystagmus or other industrial disease or serious accident. In 1932 the applicant and his son, James Henry Birch, were discharged owing to a reason unconnected with the applicant's health, but after negotiations with their trade union the respondents agreed to take them back, and in fulfilment of this promise on September 18, 1933, sent for them to sign on again. On this occasion the particulars relating to the applicant were entered by a clerk named Bramham in the presence of the applicant's son and were signed by the applicant. These particulars also contained a denial that the applicant had suffered from nystagmus or other industrial disease or serious accident, and it was this denial that was relied upon by the respondents as a false and wilful representation in writing within the meaning of s. 43, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1925. In November, 1938, nystagmus recurred and the applicant was duly certified on November 19, 1938, and he had been totally disabled ever since.

On November 23, 1938, Dr. Hargreaves on behalf of the respondents examined the applicant and reported him as a severe case of nystagmus, and on the back of the form recorded the applicant's admission that he "was off at Hemsworth "twenty years ago for two years." The respondents, without making any inquiries, paid compensation until June 8, 1940, and then stopped payment on the ground that the workman was disentitled to compensation because of the false statements he had made on entering their service.

It was admitted that the disease was due to the nature of the applicant's employment in a coal mine by the respondents and that he had been since the date of certification and still was totally incapacitated thereby. The respondents paid compensation to the applicant from the date of disablement to June 8, 1940, at the rate of 30*s*. per week.

The applicant applied to the court for an award for restoration of compensation. In his particulars in answer to question 12, "Date of service of statutory notice of disablement or suspension on respondents," and question 13: "If notice not served reason for omission to serve same" the workman said: "Disease and disablement admitted and "compensation paid."

The respondents by their answer alleged—(1.) That at the time of entering the employment of the respondents the applicant wilfully and falsely represented himself in writing as not having previously suffered from nystagmus or any other industrial disease, and was not therefore entitled to the compensation claimed or any compensation.

(2.) That the weekly payments made by them between November 19, 1938, and June 8, 1940, were made without and before having knowledge of his having previously suffered from nystagmus or any other industrial disease.

At the hearing before the county court judge the applicant joined issue on both these points.

(1.) With regard to the first he admitted that on September 18, 1933, he signed an entry in the signing-on book of the respondents containing inter alia the answer "no" to the question whether or not he had previously suffered from nystagmus, and that that answer was false in that he had previously suffered from nystagmus while in the employment of the Hemsworth Colliery Co. But he said that in the circumstances in which his signature was attached to the entry the answer to the nystagmus question ought to be deemed not to have been an answer made by him, or, alternatively, not made by him wilfully.

(2.) And with regard to the second point the applicant said that within a week of his certification, that is to say on or about November 23, 1938, the respondents acquired through Dr. Hargreaves, the doctor appointed by them to examine the applicant, the knowledge that he had previously suffered from nystagmus and that the answer in that respect recorded in their signing-on book was false, and that with that knowledge they continued to make weekly payments of compensation until June 8, 1940. The applicant said that the respondents thereby agreed to pay him compensation and made an unequivocal admission of liability and were now precluded from relying by way of defence upon the falsity of the answer even if the answer was made and wilfully made by him.

The county court judge found as a fact that the applicant at the time of entering the employment of the respondents on September 18, 1933, wilfully and falsely represented himself in writing as not having suffered from nystagmus. He also found as a fact that the respondents in making weekly payments of compensation to the applicant from November 19, 1938, to June 8, 1940, did so with the knowledge that on entering their employment he had represented in writing that he had not previously suffered from nystagmus and with the knowledge that that representation was false. Applying the test laid down in *Fraser* v. *Driscoll* (1) he could not find that the workman acted to his prejudice on any admission made by the respondents, or that the respondents were precluded by any estoppel arising out of their payments from putting forward their answer under s. 43, sub-s. 1 (*b*). But he found that there was a binding and concluded agreement between the parties, and that the employers in paying and the workman in receiving the weekly payments of compensation did so upon a clear understanding and acceptance of the fact that all questions as to liability had been settled between them, and that the payments of compensation were to continue until the condition of the workman should give rise to an occasion for review or for the operation of the machinery provided by s. 12, and that consequently the employers having so agreed were not entitled to discontinue payments on the ground that he had drawn compensation for the disease at the Hemsworth colliery for over three years. The county court judge considered that he was bound by a decision of the Court of Session in *Jamieson* v. *St. Flanan Coal Co.* (2) in which the majority of the Court of Session held that s. 43, sub-s. 1 (*b*), did not enact an absolute disqualification from receiving compensation but merely provided a ground of defence against the claim, and that certain dicta to the contrary effect of Lord Hailsham and Lord Thankerton in *Scott* v. *Summerlee Iron Co.* (3) were obiter and not binding upon him. He accordingly made an award in favour of the applicant for compensation at the rate of 30s. per week plus supplementary allowances.

The respondents (employers) appealed.

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(1) (1916) 9 B. W. C. C. 264.

(2) 1935 S. C. 138.

(3) [1931] A. C. 37, 44, 51.

Blanco White K.C. and *W. H. Duckworth* for the appellants. The decision of the county court judge in this case was wrong. There was no binding agreement between the employers and the workman as there was no consideration for the suggested agreement. Under the express terms of the Workmen's Compensation Act, 1925, it is a condition of the right of a workman to compensation that he should not have offended against s. 43, sub-s. 1 (*b*), of the Act by wilfully and falsely representing himself at the time of entering the employment as not having previously suffered from the disease. In *Scott* v. *Summerlee Iron Co.* (1) Lord Hailsham said in his speech : "Further, it is to be noted that the statute does not purport to "afford a defence against the workman's claim to an employer "who has been misled by the misstatement ; it renders the "misstatement a disqualification of the workman from the right "to receive compensation." Lord Thankerton also, in the same case (2), refers to the proviso in sub-s. 1 (*b*) of s. 43 as being "a condition of the right to compensation" and that "the "making of a false declaration on entering any employment "within the twelve months . . . . will disentitle the workman "to compensation." The county court judge in his judgment founded himself upon *Jamieson* v. *St. Flanan Coal Co.* (3). All that that case says is that a misrepresentation by a workman as to his having previously suffered from a disease is not an absolute disqualification of the right of the workman to compensation by virtue of the statute. But as soon as the misrepresentation is brought to the notice of the court, the court is bound to take judicial cognizance of the fact, and ipso facto the case falls outside the jurisdiction of the court. It is true that the opinions of Lord Hailsham and Lord Thankerton expressed in *Scott's* case (4) were only dicta, but they were very germane on the point at issue in the present case. There is no evidence in the present case of an agreement by the employers to pay compensation to the workman, but merely that the workman took the money that was paid to him by his employers. That is the only evidence that the employers

(1) [1931] A. C. 37, 44.
(2) Ibid. 51.
(3) 1935 S. C. 138.
(4) [1931] A. C. 44, 51.

considered that they were liable to pay compensation to the workman.

Gilbert Paull K.C. and *Marven Everett* for the respondent. The decision of the county court judge in this case was correct. The questions for decision are whether the employers agreed to accept liability—*Guest, Keen & Nettlefolds, Ld.* v. *Williams* (1), and if they did, whether the agreement can be set aside. An agreement can be implied from the surrounding circumstances, and payment of compensation for a substantial period, as in the present case, is evidence of an agreement to pay it—*Goodsell* v. *S. B. "Lloyds" (Owners)* (2), where such payment was the only evidence. The question once settled by agreement cannot be reopened—per Cozens-Hardy M.R. (3)—on such an application as this. Even in *Jamieson* v. *St. Flanan Coal Co.* (4), where the employers did not know the facts when they made the agreement, the Court refused to set it aside because the employers had not chosen to make inquiries. Technically the workman should not have brought these proceedings. When the employers did not pay compensation under the agreement he should have applied to have the agreement recorded, and then the employers could have applied for a review. The employers were not induced by fraud to make the agreement, although the workman obtained the employment by fraud. If the employers said that they were induced into making the agreement because the workman misled them, the answer of the workman was that the employers with a knowledge of the facts continued to pay compensation to the workman. The contention on behalf of the workman can be summarized in the following six propositions. (1.) There can be no liability upon an employer under the Workmen's Compensation Acts unless certain conditions are fulfilled by the workman, e.g., that he has not been guilty of any wilful misconduct; that he is within certain classes of persons; that proper notice has been given, and a claim made within a specified time; and that in the case of an industrial disease there has been no wilful

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(1) (1925) 18 B. W. C. C. 68.
(2) [1914] 3 K. B. 1001.
(3) [1914] 3 K. B. 1001, 1006.
(4) 1935 S. C. 138.

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misrepresentation that he has not previously suffered from the disease. (2.) Each one of these conditions may be a matter of dispute between the parties, that is to say, a question may arise as to each or any of them. (3.) Any such dispute or question may be settled by agreement or by arbitration. (4.) An agreement and an arbitration award have precisely the same force. There is in each case a right to record the agreement or the award and that recorded agreement or recorded award is equivalent to a judgment. (5.) Either an agreement or an award is a complete determination of the rights of the parties, subject to the ability to set either aside on the ground that the agreement or the award is not a genuine agreement or award. (6.) It follows that there is nothing to prevent an employer from dispensing with the fulfilment of any of the conditions necessary to be complied with by a workman either by agreeing with the workman that he (the employer) is liable to pay compensation, or by submitting to an award granting compensation, to the workman. In this case therefore the employers by agreeing to pay compensation dispensed with the necessity for the workman to prove that he had not made any wilful misrepresentation. In *Rees* v. *Imperial Navigation Coal Co.* (1) a workman applied to his employer for compensation more than twelve months after he had left their employment, he having been certified to be suffering from nystagmus. The employers paid full compensation for four years and then ceased payment. The Court of Appeal held that there was good consideration for the agreement and that it was binding on the employers. If an employer agrees to pay compensation to a workman, it means that the employer agrees to pay compensation under the Act and not to make a present to the workman. The workman in the present case might have taken arbitration proceedings under the Act and attempted to prove that he came within the Act, and the giving up of that right by the workman is a good consideration for an agreement by the employers to pay compensation, even though such arbitration proceedings would have failed. The condition with regard to

(1) (1927) 20 B. W. C. C. 287.

wilful misrepresentation by the workman is one that the employers can waive. The words in s. 43, sub-s. 1 (*b*), "If it be proved" mean "if it be proved before the tribunal set up by "the Act to try the case." The employers could not have obtained an order for prohibition to restrain the arbitrator from trying the case. *Dutton* v. *Sneyd Bycars Co., Ld.* (1), is a case on the other side of the line. The workman there was suffering from gas poisoning which is not an industrial disease and therefore could not claim compensation under the Act. It was held by the Court of Appeal that the employers were not estopped by the fact that they had paid him compensation from saying that the workman was not within the Act, and that there was no evidence of an agreement. In *Scott* v. *Summerlee Iron Co.* (2) there was no question as to any agreement to pay compensation. It was merely a case of a false representation. The workman here relies upon the judgment of Lord Clyde in *Jamieson* v. *St. Flanan Coal Co.* (3)

Blanco White K.C. replied.

Cur. adv. vult.

1941. Feb. 24. The following judgments were read:

SCOTT L.J. This is an appeal by the employers from an award of His Honour Judge Kingsley-Griffith, in the Thorne County Court, dated November 21, 1940, whereby he ordered the employers (now appellants) to pay to the workman (now respondent) 1*l.* 10*s.* a week (plus supplementary allowances upon which no question arises in this appeal), as compensation for the industrial disease of miner's nystagmus, as provided by s. 43 of the Workmen's Compensation Act, 1925, the weekly payment to commence as from June 8, 1940, and to continue, etc., in the usual form. The date when disablement commenced was certified by the certifying surgeon as November 19, 1938. The employers paid from then till June 8, 1940, when they stopped payment. On June 10, 1940, the Mutual Indemnity Company, in which the employers were insured,

(1) [1920] 1 K. B. 414.
(2) [1931] A. C. 37.
(3) 1935 S. C. 138.

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wrote to the workman informing him that no further payments were being made, because "when being engaged you signed a "declaration that you had never previously suffered from "nystagmus, whereas we find that you drew compensation "for the disease at Hemsworth Colliery for over three years." The declaration referred to was dated September 18, 1933, when he had last entered into the employers' employment. Sect. 43, sub-s. 1, para. (*b*)—or "modification," as it is called in the section—is as follows: "If it is proved that the workman "has at the time of entering the employment wilfully and "falsely represented himself in writing as not having previously "suffered from the disease, compensation shall not be payable." On September 19, 1940, the workman requested arbitration as to the employers' liability to pay, and as to its amount and duration; claimed 30s. a week, and added in paras. 12 and 13 of his particulars "disease and disablement admitted "and compensation paid." The employers denied liability on the grounds (*a*) of his "wilful and false representation"; and (*b*) that the payments made to him by them were made "without and before having knowledge of his having previously suffered from nystagmus." At the trial it appeared that the workman had first been employed by the appellants on September 26, 1928; and had then signed a declaration that he had never had nystagmus, in precisely similar terms to that signed in 1933, when he was re-engaged: that both were contained in the employers' regular books, in which were kept their records of the men employed. The workman himself gave evidence; and admitted, mostly under cross-examination, that he had had nystagmus at various times, with periods of incapacity therefrom lasting over seven years; and that he had been medically certified five times as suffering from the disease. He sought to prove that he signed the declarations of 1928 and 1933 addressed to the present appellants without knowledge that the document contained a declaration by him that he had never suffered from nystagmus. The learned judge disbelieved him, and found definitely against him on the issue of fact under s. 43, sub-s. 1 (*b*), of the Act. For that finding of fact there was ample evidence.

At the arbitration the main dispute was on the above issue of fact under sub-s. 1 (*b*). The evidence on both sides was addressed exclusively to that question; but the workman's counsel in the alternative made two replies by way of confession and avoidance of the employers' plea of s. 43, sub-s. 1 (*b*): the first was based on estoppel; the second, in the further alternative, on agreement. I suppose the learned judge regarded both as sufficiently covered by paras. 12 and 13 of the workman's particulars. On the issue of estoppel there was no evidence before the court of any representation of fact made to the workman by the employers; nor of any action thereon taken by the workman to his prejudice; and I agree generally with the learned judge's view, that in law there could not be, on the facts before him, any estoppel whatever. In particular, I endorse his criticism of the first sentence of the passage headed "Estoppel," which appears at page 657 of Willis's book on Workmen's Compensation, 33rd ed.: "An unequivocal admission of liability binds the "party making it, although it is not acted upon by the other "side." The sentence purports to state the effect of the decision in *Fraser* v. *Driscoll* (1), a case inadequately reported, in which there is no record of real discussion upon the doctrine of estoppel: it was also adversely criticized in *Dutton* v. *Sneyd Bycars Co., Ld.*, by Warrington L.J. (2). The common law doctrine of estoppel in pais has nothing whatever to do with "admission of liability," whether unequivocal or not. On such facts as appeared in the present case, the use of the term is wholly misconceived. Mr. Paull told us, when he was expounding his argument upon the effect of agreement as opposed to estoppel under the Act, that he had searched the reports, and so far as he could find, although there were many decisions upholding an agreement under the Workmen's Compensation Act, there was not one where a workman had succeeded upon the basis of estoppel; and he may well be right, as it is not easy to imagine a representation which would estop either party to a dispute under the Act from proving the true facts. But, as the learned judge said, the argument

(1) 9 B. W. C. C. 264.

(2) [1920] 1 K. B. 414, 420.

open to the applicant based on agreement is different, and very much stronger.

In my opinion, there was in the present case a statutory agreement which justified the decision of the learned judge and entitles the respondent to have the appeal dismissed; but the nature, scope and consequence of such an agreement are matters of general importance; and it may be useful to consider the principles involved before referring to authorities.

The policy of Parliament, as expressed in the Workmen's Compensation Acts, has throughout been to make the machinery for operating them as simple as possible, so that employers and workmen might adjust their differences between themselves without calling in the lawyers. Possibly the novelty of the legislation made achievement difficult: but if Parliament in 1897, when the first Bill was before it, had with prophetic eye foreseen the thirty-four volumes of Butterworths' Reports of Workmen's Compensation Cases which lie within reach of each of us on this Bench whenever we are taking that list, I doubt whether any lawyer to-day can picture the horror with which either House would then have regarded that prospect. The feature of the Acts which above all others shows how Parliament hoped to save industry from the technicalities of legal procedure, with its inevitable expense, is the very method of "agreement" upon which this appeal turns. Sect. 21 of the present Act (which was s. 1, sub-s. 3, of the 1906 Act), enables the parties to *settle by agreement* any question arising between them out of the provisions of the Act. Naturally enough the section also provides for settlement by compulsion of law: but, even so, it calls it "arbitration," apparently with the intention of providing something less formal than ordinary legal procedure; and gives to two types of lay tribunal jurisdiction to make an "award." The heading of the fasciculus of sections dealing with procedure (of which s. 21 is the first) is "Procedure for determining "compensation and settling questions."

The material part of s. 21 is contained in sub-s. 1, and is as follows: "If any question arises in any proceedings under "this Act as to the liability to pay compensation under this

"Act (including any question as to whether the person injured "is a workman to whom this Act applies), or as to the amount "or duration of compensation under this Act . . . . the question, "*if not settled by agreement*, shall, subject to the provisions "of this Act, be settled by the arbitration of a representative "committee, or of an arbitrator, or of a Judge of County "Courts in accordance with the First Schedule to this Act." The most significant feature of the section is the implication, which appears to me plainly indicated by its language, that for the purpose of settling disputes an "agreement" is to be equally efficacious with a lay award. This equivalence of agreement and award in truth is of the essence of the enactment; and that principle is given its natural extension or application in s. 23; the material parts of which are as follows: "Where the amount of compensation under this Act "has been ascertained, or any weekly payment varied, or any "other matter decided under this Act, either by a committee "or by an arbitrator or by agreement, a memorandum thereof "shall be sent, in manner prescribed by rules of Court, by the "committee or arbitrator, or by any party interested, to the "Registrar of the County Court, who shall, subject to such "rules and subject to the provisions hereinafter contained, on "being satisfied as to its genuineness, record such memorandum in a special register, and thereupon the memorandum "shall for all purposes be enforceable as a County Court "judgment."

Under s. 21, there is no difference between (1.) an agreement between the parties; (2.) an award of a committee or arbitrator; and (3.) an award of a county court judge: they are there all treated as on the same footing. Nor is there any difference under s. 23 between a lay award and an agreement; but there is a difference between those two kinds of lay or non-judicial "settlement" on the one hand, and an actual county court judge's award on the other, with regard to judicial execution; yet the section enacts a simple device for removing the difference, namely, recording and registering the award or agreement in the county court; thus completing the full recognition of equivalence between agreement and award.

It was doubted at one time whether an unrecorded agreement was within s. 21, or could have the same effect as a recorded agreement: but this doubt was removed by the decision of the Court of Appeal in *Guest, Keen & Nettlefolds, Ld.* v. *Williams* (1), see per Sargant L.J. The insertion in s. 25 of the requirement that certain agreements shall, as a condition of their validity, be recorded, would seem to put the position of other agreements beyond all doubt. If then an unrecorded agreement is equally effective with an unrecorded award of a lay arbitrator, it *must* have the same consequences as the latter: it *must* be binding on the parties: it *must* settle finally all questions which were or could have been grounds of objection in the dispute and thus fell within the subject-matter of the agreement; and it *must* preclude each party from raising thereafter any question which would have been relevant and could have been raised at the time the agreement was negotiated, although it was not then raised. In this respect its effect is analogous to that of the estoppel by record which is brought about by a judgment; and per contra is wholly different in character to the effect of an estoppel in pais.

What I have said above, however, leaves open the main question argued for the employers, which came before us in the following form. Ex hypothesi when the workman asked for compensation, he already had, by reason of s. 43, sub-s. 1 (*b*), lost his right to compensation; and there was then nothing to prevent the appellants meeting his request with a blank refusal. Instead they paid and continued to pay for eighteen months. Mr. Blanco White's legal contention for them was that the effect of "modification" (*b*) was (1.) to put the workman outside the Act; and, therefore, (2.) to deprive any arbitrator, whether judicial or non-judicial, of all statutory jurisdiction under the Act; and that (3.), for the same reason it was not within the competence of the parties to make a statutory agreement for the payment and receipt of compensation. He relied on *Dutton* v. *Sneyd Bycars Co., Ld.* (2), where a workman had suffered from an industrial disease, which was not within s. 8, sub-s. 1, of the Act of 1906 (now s. 43) at all. The employers had paid him compensation for a time, and had purported to do so under the Act. After a while, however, they took the objection that the disease was outside the Act, and stopped payment. The workman replied by alleging that they were estopped by conduct from disputing liability under the Act; and the county court judge so held. The Court of Appeal, however, reversed that decision, on the ground that there was no estoppel. The only point decided was that there was no estoppel; but Warrington L.J. (1), also expressed views on the subject of agreements: first that there was in that case no agreement in fact; and, secondly, "that "the parties cannot by any form of estoppel or by agreement "so enlarge the operation of the Act as to bring within it "other cases or to extend the limited statutory jurisdiction "to those cases." Atkin L.J. in the same case said (2) "Em-"ployer and workman cannot by agreement give one another "rights under the Act which are not given by the Act; nor "can they give to the county court judge jurisdiction to "determine under the Act disputes which are not under the "Act . . . . It is entirely different where the parties determine "by agreement questions that arise within the Act, e.g., "whether a person injured is a workman to whom the Act "applies, whether he was injured by accident, whether the "accident arose out of, or in the course of, his employment, "what the amount of the compensation should be. In such "cases the agreement of the parties operates within the ambit "of the Act." In the latter passage, I think the Lord Justice was accepting as the proper criterion for deciding whether an agreement is or is not under the Act the test which I regard as the right one, namely: Was the issue, which was covered by or involved in the agreement, a question which, if disputed in an arbitration, the arbitrator would, under his statutory reference, have had jurisdiction to decide? In such case the agreement is not outside the Act; and the issue in question is disposed of by the agreement for good and all. There is nothing in the decision in *Dutton's* case (3) which interferes with our judicial freedom in the present case. The view which I have just expressed was indeed expressed in this Court in *Guest, Keen & Nettlefolds, Ld.* v. *Williams* (1), to which I have already referred. The accident to the workman there fell outside the Act on another ground, namely, that it was not in the course of his employment as defined by the House of Lords in *St. Helen's Colliery Co.* v. *Hewitson* (2), but the workman and his employers had made an agreement for payment to him of compensation; and the Court of Appeal, affirming the county court judge, held that the agreement bound the employers, because the issue whether or not the accident arose in the course of employment was an issue which an arbitrator under the Act would have had jurisdiction to decide. Scrutton L.J. in *Guest, Keen & Nettlefolds, Ld.* v. *Williams* pointed out (3) that the House of Lords, in *Russell* v. *Rudd* (4), had held: "that you cannot make "agreements which give the workman more or less than the "benefit he is entitled to under the Act, because that is contrary "to s. 1, sub-s. 3, of the Act of 1906" [now s. 21, sub-s. 1, of the Act of 1925], "and is contracting out of the Act"; but the Court held in *Williams's* case (1) that the unrecorded agreement there made was binding on the employers. The next case, chronologically, which was cited to us for the employers was *Scott* v. *Summerlee Iron Co.* (5), a Scottish case in which the House of Lords dismissed an appeal by the workman from the Second Division of the Court of Session. That case, like the present, turned on the question whether a false and wilful representation that he had not suffered from nystagmus had been made by the workman to the employer on entering his employment within "modification" (*b*).

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(1) 18 B. W. C. C. 68, 80.

(2) [1920] 1 K. B. 414.

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(1) [1920] 1 K. B. 414, 419, 420. (2) Ibid. 421. (3) Ibid. 414.

The appeal turned on the simple question whether the workman had made the representation to the employer "at "the time of entering the employment," so as to bring "modification" (*b*) into operation and bar the workman's right to payment. The date when he had undoubtedly entered "the employment" to the nature of which the disease was due, was April, 1927; but he had made no such representation then. The sheriff-substitute held that his employment by the employer from whom compensation was claimed had been continued from that date until September, 1928, the date of his disablement by the disease; and that two subsequent misrepresentations at dates within the previous twelve months when, after temporary unemployment, he had re-entered the employment, were irrelevant because there had been no break in the employment at those times. He accordingly held the workman entitled to compensation. The Court of Session reversed the decision, holding in effect that there was no evidence before the learned judge of such continuity. The House of Lords dismissed the appeal, holding that there had been on each of the two periods of unemployment a break in the employment, so that each of the two later misrepresentations were made "at the time when the workman "entered the employment," with the result that the workman's right to compensation was barred by para. (*b*) of the section. The decision itself is thus irrelevant to the present appeal: but in the course of their opinions Lord Hailsham and Lord Thankerton made important general observations about the meaning of para. (*b*) which might affect the scope of an agreement under the Act; and on these Mr. Blanco White fastened as the basis of his main argument, although he conceded that they were obiter and not actually binding on us. Lord Hailsham said (1): "Further, it is to be noted that the statute "does not purport to afford a defence against the workman's "claim to an employer who has been misled by the mis-"statement; it renders the misstatement a disqualification "of the workman from the right to receive compensation." Lord Thankerton said (2): "Further, proviso (*b*) is a condition "of the right to compensation, and the last employer is not "mentioned except in the provisos which deal with the method "of recovery of the compensation."

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(1) 18 B. W. C. C. 68.
(2) [1924] A. C. 59.
(3) 18 B. W. C. C. 77.
(4) [1923] A. C. 309.
(5) [1931] A. C. 37.

In my opinion the use to which Mr. Blanco White sought to put these two general pronouncements was not justified by the context in which they were uttered. Their Lordships' minds were not on the question now before us. In particular, they were not considering whether the Legislature had or had not given an arbitrator power to adjudicate on the issue raised by "modification" (*b*); and it is primarily because I think that that paragraph must be so construed, that I hold that the agreement in the present case necessarily precluded the employers (appellants before us) from repudiating their liability and stopping payment. But there is a Scottish authority subsequent to *Scott* v. *Summerlee Iron Co.* (1) which is directly in point, the case of *Jamieson* v. *St. Flanan Coal Co.* (2). In August, 1931, a miner signed a declaration under s. 43, sub-s. 1 (*b*), on entering the employment of B. He had in fact suffered from nystagmus when employed by A in 1923. In May, 1932, he entered the employment of C but, as he told the manager that he had had nystagmus, he was not asked to sign a declaration. In August he was again disabled by nystagmus, when still employed by C. Proceedings for compensation were started by him and settled by an agreement. The sheriff-substitute held that the misrepresentation in August, 1931, was not wilful, and that he was entitled to compensation, in accordance with the agreement. Two questions of law had been left to the Court by the sheriff-substitute (in an illogical order), the first as to the effect in law of the agreement in regard to the issue under s. 43 (1) (*b*); the second, whether the representation was wilful. The First Division of the Court of Session held unanimously that the written misrepresentation was wilful; but, by a majority, Lord Blackburn dissenting, that the agreement of September, 1932, precluded the employer from disputing liability. The two dicta in *Scott's* case (3), which I have quoted, were considered. The decision is not binding on this Court; but the judgments are entitled to great respect; and that of Lord President Clyde, in which he reviewed the legislation and the authorities, is of special value in the present appeal. I concur in the whole of his judgment, subject however to one small

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(1) [1931] A. C. 44.

(2) Ibid. 51.

(1) [1931] A. C. 37.
(2) 1935 S. C. 138.
(3) [1931] A. C. 37, 44, 51.

modification. The question of the scope within which an agreement under the Act binds the parties in a case where s. 43, sub-s. 1 (*b*), could before agreement have enabled the employer to disclaim liability, does not necessarily depend on whether the provision is on the one hand a condition of the workman's right to compensation, or on the other hand a mere defence which the employer may raise if he chooses; it depends primarily on whether the Act gives an arbitrator jurisdiction to decide the issue of fact. In my opinion it does. My reasons are as follows: (1) What an award can do, an agreement can do; what an arbitrator can, at the instance of one party, do against the will of the opposing party, the two parties can do by agreement between themselves. (2.) If the respondent to a claim in arbitration has a possible answer which he might raise if he chose, but he does not raise, and allows the award to go against him, he cannot as a general rule reopen the award, or thereafter disclaim a liability established by the award. (3.) There is to that general rule one exception: the omission of a respondent to take an objection to the statutory jurisdiction of the arbitrator which he might take if he chose, cannot enlarge the arbitrator's jurisdiction under the Act, or enable him to make an order outside its limits, unless the Act has given him power to adjudicate on the particular issue of his own jurisdiction which is raised by the dispute before him: in that case, if he decides it one way, he can hear and decide the dispute; if he decides it the other way, he must decline jurisdiction. (4.) In my opinion, s. 43, sub-s. 1 (*b*), is an enactment of the exceptional kind, giving the arbitrator power to decide aye or no did the workman make the representation. Its opening words, "If "it is proved," of themselves import that interpretation. "Proved" before whom? Obviously, the arbitrator. Sect. 1, sub-s. 1 (*b*), the serious and wilful misconduct enactment, is in the same words, "If it is proved." There the contention that the arbitrator has no jurisdiction would be unarguable. The proviso (i.) to s. 9, sub-s. 4, as introduced into the Act of 1925 by the Workmen's Compensation Act of 1931, is similar: "no order shall be made under this sub-section if it appears to "the judge that the workman has not taken all reasonable steps "to obtain employment." The fact that "the judge" is expressly mentioned cannot, in my opinion, prevent the implication, where he is not mentioned, that it is to his satisfaction that there shall be proof.

It is worth noticing that r. 43 of the Workmen's Compensation Rules, and Form 36 (ii.) (see p. 905 of Willis, 33rd ed.), assume and illustrate what I have called the principle of "statutory equivalence" between an award and an agreement under the Act.

Finally, it may be well to point out that the wrong statutory procedure was adopted by both sides in the present case. The workman would have been well advised to record his unwritten agreement. The employers had no right under s. 12 to stop payment; they should have applied to review. Had the workman tendered a memorandum of his agreement under s. 23, the employers could, as a matter of procedure, have raised their present contentions. In either case the result would have been the same; but the procedure of the Act is in principle simple; and it would be better for both sides—and for the Courts—if it were followed.

Since writing this judgment, I have had the opportunity of reading that of my brethren: I agree with their conclusions and also with what they say on certain matters which I have not mentioned.

The appeal must be dismissed with costs. I should like to thank Mr. Paull for his very clear argument.

Goddard L.J. The judgment that I am about to read has been read by Clauson L.J., who authorizes me to say that he agrees with it and adopts it.

The facts found by the learned arbitrator can, for the purpose of this appeal, be quite shortly stated. The workman entered the service of the employers on September 26, 1928. On entering the employment in 1928 and again on re-entering it on September 18, 1933, he represented in writing that he had not previously suffered from nystagmus. This representation was false and is found by the arbitrator to have been made wilfully. During his service with the employers the workman again contracted nystagmus and on November 19, 1938, obtained the certificate from the certifying surgeon necessary to entitle him to compensation. The employers required him to be examined by a surgeon on their behalf, and on this examination the workman disclosed that he had previously suffered from the disease. That he did not make a full disclosure as to the number of times that he had previously been disabled from this cause is the fact, but is immaterial. The surgeon reported to the employers in writing that it was a severe case and recorded in his report the workman's admission that he had previously suffered from this complaint. Thereafter the employers, without further question, paid the workman, who was and is wholly incapacitated, compensation at the full rate until June 8, 1940, when they ceased payment. They gave as their reason that the workman was disentitled to it because of the false statement he had made on entering their service. Thereupon the workman took the present proceedings claiming compensation. No explanation was offered by the employers at the hearing why they paid compensation after receiving the doctor's report that the man had previously suffered from the disease. The learned arbitrator has found that they made the payments with knowledge of the fact that the representation was false, and he bases his finding on the fact that the employers always had in their possession the means of knowledge to this effect and so he attributes actual knowledge to them. Were I of the opinion that it was necessary for the workman to prove that when they made the payments the employers were conscious of his deceit, I should hesitate long before I held that, because they had means of knowledge in their possession, this was enough to show that they had actual knowledge, but, as will appear later, I do not think it was incumbent on him to prove this, and I therefore say no more about it. The arbitrator then went on to hold that the payment and receipt of compensation constituted a binding and concluded agreement whereby all questions of liability between the parties were settled, subject only to the provisions for reviewing the

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payments as provided by ss. 11 and 12 of the Act. Accordingly, he awarded in favour of the workman.

For the appellants three main contentions were advanced, (1.) that there was no evidence on which an agreement could be found; (2.) that there was no consideration for any agreement; and (3.) that modification (*b*) to sub-s. 1 of s. 43 imposed a disqualification on the workman from receiving compensation, and therefore there was no jurisdiction to award it. Now, it is clear that the Act contemplates that questions whether a workman is or is not entitled to compensation are to be settled either by agreement or by arbitration. If the parties agree there is no need to proceed to arbitration, and an agreement is as binding as an award. Machinery exists for the recording of agreements, which then have the effect of a county court judgment, and execution can be issued thereon. But cases, binding on this Court, have decided that so far as settlement of questions relating to the right to compensation are concerned, an unrecorded agreement has the same effect as one which has been recorded, and the appellants did not contend to the contrary. But it is said here that the mere fact of payment is no evidence of agreement. With this contention I cannot agree. When a workman claims compensation and, in the case of an industrial disease, produces the necessary certificate, and thereupon the employer, without stating that he does so without prejudice or pending further inquiry, or the like, pays and continues to pay the full amount for which the Act provides and offers no evidence to explain why he made these payments, the only inference that can be drawn, as it seems to me, is that the payment involves a recognition of liability and an implication that the employer agrees that the workman is entitled to it. If authority be needed it will be found in *Guest, Keen & Nettlefolds, Ld.* v. *Williams* (1), and *Rees* v. *Imperial Navigation Coal Co.* (2). The consideration for the agreement is, of course, the fact that the workman abstains from taking proceedings to obtain an award, and that must be true of every agreement made for the purpose of the Act. It would indeed be a strange state of affairs if, when an Act of Parliament has expressly stated that agreement should be one of the methods for settling questions, it were open to either party to say that, although there was an agreement. there was no consideration to support it.

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(1) 18 B. W. C. C. 68.

(2) 20 B. W. C. C. 287.

Apart from whether modification (*b*) of s. 43, sub-s. 1, amounts to such a disqualification that the Court has no jurisdiction to award in favour of the workman, the question arises whether the employers can now say that the agreement is vitiated by reason of the workman's misstatement on entering their service. In my opinion, they cannot. The agreement to pay compensation was not induced by any fraudulent representation. The workman said no more than, "Here is the "certifying surgeon's certificate that I have contracted a disease "while in your employment, please pay me compensation." An answer was available to the employers had they chosen to avail themselves of it, but they did not, and, incidentally, have given no explanation why they did not. As already pointed out, an agreement has the same effect as an award, and if the workman had taken proceedings to obtain an award and the employers had not set up the misrepresentation as a defence they could not afterwards have relied upon it except as a ground for applying for a rehearing by reason of the discovery of further evidence. They would then have had to show that the further evidence was such as could not have been discovered before by the application of reasonable diligence, and obviously they could not have shown that in the present case. If then they could not upset an award on this ground, neither can they upset an agreement. This was the opinion of the Court of Session in *Jamieson* v. *St. Flanan Coal Co.* (1), and I entirely agree with it. It is, however, said that passages in the speeches of Lords Hailsham and Thankerton in *Scott* v. *Summerlee Iron Co.* (2), oblige us to hold that modification (*b*) of s. 43, sub-s. 1, of the Act imposes an absolute disqualification on a workman who has made a wilful misrepresentation on entering the employment. It is true that in that case both these noble and learned Lords did say that the provisions of the modification did not afford

(1) 1935 S. C. 138.

(2) [1931] A. C. 37, 44, 51.

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a defence but imposed a disqualification; but their remarks on this matter were, with all respect, obiter. The question before the House in that case had nothing to do with that which now falls for decision; it was as to the effect of a false representation made, not to the employer against whom the workman had taken proceedings, but to another in whose service he had previously been. On this point I take the same view as did the majority in the Court of Session in *Jamieson's* case (1). It appears to me that the opening words of the paragraph in question, "If it is proved," clearly contemplate the misrepresentation being set up as an answer to the claim, and that for this purpose there is no difference between this paragraph and proviso (*b*) to sub-s. 1 of s. 1, which makes serious and wilful misconduct a ground for disallowing compensation and which, so far as I am aware, has always been regarded as a matter of defence. As Clauson L.J. pointed out during the argument, if this paragraph goes to jurisdiction it would be open to the employers to obtain a prohibition. If that remedy were sought, the answer surely would be that the false representation must be proved in the arbitration proceedings; it does not appear on the face of the proceedings, it is a matter that is, or may be, in issue, and which, if proved, will afford an answer.

One other matter calls for attention. As was pointed out by Scrutton L.J. in *Guest, Keen & Nettlefolds, Ld.* v. *Williams* (2), where employers have ceased to make payments under an unrecorded agreement to a man who is still incapacitated, the proper remedy is for the workman to apply to record the agreement, and not to start proceedings de novo. The employer can then take any objection that the Act allows to the recording of the agreement. The fact that this course was not adopted in the present case ought not, however, to affect the result for two reasons—firstly, no such point was taken at the arbitration; and, secondly, the employers would not have been entitled to set up the misrepresentation in answer to the application. It did not affect the genuineness of the agreement, and, for the reasons already given above, they could not have

(1) 1935 S. C. 138.

(2) 18 B. W. C. C. 68, 78.

asked to have the agreement set aside for misrepresentation. In my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors for employers, appellants: *Johnson, Weatherall, Sturt & Hardy, for Parker, Rhodes, Cockburn & Co., Rotherham.*

Solicitors for workman, respondent: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

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DUNCAN *v.* CAMMELL, LAIRD AND COMPANY, LIMITED, AND OTHERS.

Discovery—Affidavit of documents—Objection to production of certain documents—Disclosure injurious to public interest—Affidavit of Minister of Crown—Refusal to direct production of documents to Court.

It is the practice of the Court to accept the affidavit of one of His Majesty's Ministers, who is not a party to the action, that the production of certain documents would be against the public interest and neither to order their production in the action nor to have them produced to the Court for it to form an opinion whether the view expressed by the Minister is correct.

This rule of practice has been settled at least since 1860 by *Beatson* v. *Skene* (1860) 5 H. & N. 838 and subsequent authorities including *Ankin* v. *London & North Eastern Ry. Co.* [1930] 1 K. B. 527.

Semble, that theoretically the Court has a right to look at the documents, but that by the practice of the Court that right will only rarely be exercised as in *Robinson* v. *State of South Australia* [*No.* 2] [1931] A. C. 704.

Appeal from Hilbery J.

This was an interlocutory appeal by the plaintiffs in consolidated actions brought by two widows of persons who perished in the disaster to the submarine *Thetis* during her trials on June 1, 1939, against the defendants, Cammell, Laird & Company, Ld. (hereinafter called "the company") as the builders of the submarine, and other defendants, claiming damages for negligence.

In their affidavit of documents the company objected to produce the documents mentioned under subhead (*b*) to the second part of the schedule of documents on the ground that they had been acquired and held by them subject to the directions of the Admiralty. On January 9, 1941, the plaintiffs applied to the Master for an order that the company should give inspection of these documents to the plaintiffs and their solicitors and permit them to peruse the same and take copies. On January 29, 1941, Mr. Alexander, the First Lord of the Admiralty, made an affidavit in which he stated that the solicitors to the company had transmitted to the Admiralty a list of the documents in question and he continued : "All the said documents were considered by me "with the assistance of my technical advisers and I formed the "opinion that it would be injurious to the public interest "that any of the said documents should be disclosed to any "person. I accordingly instructed the Treasury solicitor to "write on behalf of the Lords Commissioners to the solicitors "to the said defendants not to disclose the documents set "out in the said list or their contents to the plaintiffs or "either of them or to any one on their behalf, nor produce "them for inspection in this action and to require them to "claim privilege for the documents on the ground that it "would be injurious to the public interest that the same should "be disclosed or produced for inspection." The letter of the Treasury solicitor dated January 27, 1941, in which he informed the company that the First Lord objected to the production of any of the documents on the grounds of public policy was exhibited.

The Master dismissed the plaintiffs' application and Hilbery J. dismissed an appeal from the Master. The plaintiffs appealed.

Wallington K.C. and *Donald McIntyre* for the plaintiffs. The Court should look at the documents in question to see if the claim not to produce them is well founded and not rely on the affidavit of the First Lord of the Admiralty. It is true that in *Ankin* v. *London & North Eastern Ry. Co.* (1) Scrutton L.J. laid it down that it was the practice of the Court to accept the statement of a Minister that production of a document would be against the public interest, even though the Court might doubt whether any harm would be done by producing it ; but this is not an authority for saying that this is the law and it is contended that he has stated the rule too highly. Order XXXI., r. 19 (A), sub-r. 2, provides that when privilege is claimed it shall be lawful for the judge to inspect the documents to decide the validity of the claim.

[DU PARCQ L.J. Does not that mean privilege claimed by a party to the action ? This is not privilege in that sense.]

That is so and it is admitted that if, at the trial an accredited

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(1) [1930] 1 K. B. 527, 533.

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representative of the First Lord appeared and refused to produce a document on the ground that the Minister considered it to be contrary to the public interest that any one should see it, the judge would not normally insist on seeing it. But the Court has power to do so and there are circumstances in the present case which should lead the Court to exercise that power. The material documents or copies of them are in the possession of the company and the Court should look at the description of the documents to see whether the First Lord has duly exercised his mind regarding them. This is an action for damages and the parties sued include the widows of a leading seaman and a commissioned officer. There is a strong probability that the Admiralty will not allow those widows to suffer, and the Admiralty is, therefore, to all intents and purposes a party to the action in which the proof of the plaintiffs' case must largely depend on these documents. Actually, the first of the documents is relied on by the company in their defence, and it is difficult to see how that could be privileged. In the inquiry held after the disaster counsel found it necessary to see a sister ship, but the plaintiffs have been refused this concession. Another document in question is a certificate of the satisfactory condition of the submarine, and it is impossible to say that is privileged. There are other documents which the plaintiffs' solicitors who were engaged in the inquiry participated in preparing. Another document is a notebook of the company's painter. This is a case then where the Court should not feel bound on principle to accept the affidavit of the First Lord. The Court is not now being asked to order discovery, but itself to look at the documents. The documents are not so technical that the Court could not form a view which the plaintiffs would accept. Scrutton J. did in fact inspect the documents in question in *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (1); and in *Robinson* v. *State of S. Australia* [*No.* 2] (2), a case in the Privy Council, the same course was followed.

[MACKINNON L.J. That was a case where the State itself was engaged in a trading activity.]

(1) [1916] 1 K. B. 822, 826.

(2) [1931] A. C. 704.

It is not suggested that that case is exactly like the present, but there is one element in common. It was there pointed out that privilege was being claimed for documents which had already been published. So here all the documents in question were being freely handed about at the inquiry and they were seen by most of the counsel engaged in the case and by the solicitors. It was absurd to suggest that documents already seen by many of the persons engaged in the action should not be produced. If there was no production here it would amount to a denial of justice.

R. Marven Everett for the company. The law laid down at least since 1860 in *Beatson* v. *Skene* (1) is that if a Minister of the Crown comes to the Court and makes an affidavit that in the public interest documents ought not to be produced, that is an end of the matter and all questions of hardship are immaterial. That case was followed in *Hughes* v. *Vargas* (2) and *Hennessy* v. *Wright* (3). [He was stopped.]

MACKINNON L.J. [after stating the facts :] Mr. Wallington, for the plaintiffs, has not contended that we ought entirely to disregard the affidavit of the First Lord of the Admiralty, but he submitted that the proper course for the Court to adopt would be to have the documents produced for inspection by the Court and after forming its own judgment on the nature of the documents decide whether to give effect to the objection of the First Lord, or to over-rule it and order the documents to be produced to the plaintiffs. In my view, by the settled practice, if not the rule of law of this Court, it is not open to us to take that course, or, if it is theoretically open to us, by the practice of this Court it is not proper that we should adopt that method.

The rule, I think, was settled as early as 1860, if not earlier, in *Beatson* v. *Skene* (1), and that case has been followed by *Hennessy* v. *Wright* (3); *Budden* v. *Wilkinson* (4); and, very notably, *Ankin* v. *London & North Eastern Ry. Co.* (5).

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(1) (1860) 5 H. & N. 838.
(2) (1893) 9 Times L. R. 551.
(3) (1888) 21 Q. B. D. 509.
(4) [1893] 2 Q. B. 432.
(5) [1930] 1 K. B. 527.

In this last case the rule is stated by Scrutton L.J. in these terms: "It is the practice of the English Courts to accept "the statement of one of His Majesty's Ministers that the "production of a particular document would be against "the public interest, even though the Court may doubt "whether any harm would be done by producing it." Scrutton L.J. went on to say, "I have been informed on very high "authority that the practice in Scotland is different; that "there the judge looks at the document and orders it to be "produced if he does not agree with the Minister's reasons for "considering its production to be against the public interest." Scrutton L.J. does not state who was his informant nor what was the authority, and in the Privy Council proceedings which followed in 1931, Lord Thankerton, in an interlocutory observation, questioned its correctness. It would further appear from the judgment of Lord Dunedin in *Admiralty* (*Commissioners*) v. *Aberdeen Steam Trawling and Fishing Co.* (1), that Scrutton L.J. must have been under some misapprehension as to the practice in Scotland because the decision of Lord Dunedin seems entirely in conformity with the English rule as stated by Scrutton L.J. in the above cited passage.

I think, following these authorities, that Hilbery J. and the Master were perfectly correct in deciding that no order for the production of these documents should be made, nor should an alternative order be made for the production of the documents to the Court so that the Court may exercise its opinion on the question whether they ought to be produced. We were pressed by reference to *Robinson* v. *State of South Australia* [*No.* 2] (2) before the Privy Council in 1931. I think that the result of that and other cases is probably that theoretically the Court has a right to look at the documents, notwithstanding the claim made by the Minister, in order to form its own view of the validity of the claim, but, by the practice of the Court the power will only rarely be exercised. It was exercised in *Robinson* v. *State of South Australia* [*No.* 2] (2) because that was a very special case. First, the State was itself the defendant in the action; secondly, it was an ordinary

(1) 1909 S. C. 335. (2) [1931] A. C. 704.

claim arising out of the commercial and trading activities of the defendant; and, thirdly, the claim for privilege by the Minister was not made under oath or in any proper form. Apart from a case which is exceptional for reasons like that, I think that the rule of law or practice has been uniformly laid down since 1860 until the judgment of Scrutton L.J., in 1930 (1), and the whole current of authority is to the effect which I have stated and which was stated by Scrutton L.J.

That being so, I think that the decision of the learned judge was right and that this appeal should be dismissed with costs.

GODDARD L.J. I agree. I think that the authorities, which are numerous, oblige this Court to hold that where the head of a Government department claims privilege for production of documents the Court must give effect to that claim. Whether there are any exceptions to the rule is not clear. I think that the rule, so far as this Court is concerned, is binding, and it may be that it is desirable at some time to have the matter considered by the House of Lords, who would give an authoritative and final decision on the matter.

One question on which I am not clear was raised, namely, whether, if a Minister sets up a claim for privilege, it is open to the Court to allow him to be cross-examined as to the ground on which he claims protection. I can see that there may be grave objections to that. At the same time, there is the case of *West* v. *West* (2) in which the Lord Chamberlain was called as a witness to prove the publication of certain statements made to him of which the plaintiff was complaining as being slanders on him, and the Lord Chamberlain objected to answering the questions on the ground that it was in the interests of the public that he should refuse to give evidence. Darling J. upheld his view, and that decision was upheld in the Court of Appeal. Vaughan Williams L.J., in his judgment, did indicate that a judge could permit and could put questions so that he might be satisfied on the objection, but I rather think that the ground of the learned judge's decision was that, having regard to the nature of the case, the Court had a right to be satisfied that the communication to the Lord Chamberlain was made to him in his official capacity and not as an individual. I do not think that it goes beyond that. The cases show that if the objection is taken by the Minister that objection, so far as the Court is concerned, is final and cannot be inquired into.

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(1) [1930] 1 K. B. 527.

(2) (1911) 27 Times L. R. 476.

DU PARCQ L.J. I agree. I think that undoubtedly difficult cases may arise, especially where the Crown or department is a litigant, but as to the proper decision in the present case I have no doubt whatever.

In the Scottish case of *Admiralty* (*Commissioners*) v. *Aberdeen Steam Trawling and Fishing Co.* (1) the Admiralty were suing. That aspect of the matter is dealt with by the Lord President (Lord Dunedin), in his judgment (2) where, for the reasons he gave, he said it made no real difference. It may well be that it does make no real difference, but, as I say, the case may at any rate appear to be more difficult when the public department is suing and at the same time refusing to produce documents which are apparently material documents on the ground that it would be injurious to the public interest to produce them. But here there is no such complication. The parties to this litigation are private persons and the only question is whether documents should be produced, the production of which, it is said, would be contrary to the public interest. There is, therefore, no question here of the privilege of the parties in the ordinary sense. I can imagine a case where a party was quite willing to produce a document, but was told by the Minister of the Crown concerned that the document must not be produced, and he would then, whatever the rights of the matter might be, certainly only be doing his duty as a citizen if he declined to produce it. The observations, not only of Lord Dunedin, but of the other members of the Court, in the case to which I have just referred

(1) 1909 S. C. 335.

(2) Ibid. 341.

seem to show beyond doubt that the rule in Scotland is precisely the same as the rule in this country.

Mr. Wallington relied very much on Order XXXI., r. 19 (A), sub-r. 2, of the Rules of the Supreme Court. It is quite true that that rule says that, on an application for an order for inspection, if privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document to decide on the validity of the claim of privilege, and it is also true, I think, that precisely the same words occur in the South Australian Rules of Court and were held in the Privy Council to cover a case where a refusal to produce a document by the State of South Australia, one of the parties to the litigation, was based on the ground that its production would be injurious to public policy. In a case such as the present I doubt—I do not wish to offer any conclusive opinion—whether the refusal to produce a document is a claim of privilege within the meaning of that rule. I do not think that question is decided by that decision of the Privy Council, and even if it were I should still wish to keep the point open for further consideration.

But assuming that sub-r. 2 of r. 19 (A) does cover a case like this, I think that, where the Crown is in no sense a party and where a responsible Minister of the Crown or head of the department states on oath that the production by one of the litigants of a document would be injurious to the public interest, there can be very few cases in which it would be a proper exercise of the judge's discretion to look at the document and try to make up his mind himself whether it ought to be produced—in other words, to try to decide on what must necessarily be in most cases very inadequate evidence whether the Minister of the Crown was right in the conclusion at which he had arrived on a matter as to which the Minister is above all people responsible. I might add that, if any attempt is made to use r. 19 (A), sub-r. 2, as laying down a general rule that in all cases of this kind the judge may look at the documents, one might just as well argue that under Order XXXI., r. 14, which is the general rule enabling the Court to order the production of documents, the judge might in his discretion order any document to be produced without regard to the very well settled rules which are to be found, not in the Rules of the Supreme Court, but in the decisions of the Courts subject to which those Rules have been made.

I think this is a plain case and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Evill & Coleman.*
Solicitors for defendants: *Carpenters.*

H. C. G.

DONCASTER AMALGAMATED COLLIERIES, LIMITED *v.* LEECH.

C. A.
1941
April 3.

Workmen's Compensation — Serving soldier — Family allowance — "Earnings"—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 3 (i.).

The "family allowance" given to a soldier on the married establishment who is separated from his family owing to the exigencies of the service is part of his earnings within the meaning of s. 9, sub-s. 3 (i.) of the Workmen's Compensation Act, 1925, for the purpose of determining the amount of compensation under the Act.

Port of London Authority v. *Gray* [1919] 1 K. B. 65 applied.

APPEAL from an award of the judge of the Doncaster County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

The respondent, Richard Leech, had been awarded compensation against the appellants, the Doncaster Amalgamated Collieries, Ld., under the Workmen's Compensation Act, 1925, in respect of an accident on February 10, 1938. On an application to review and terminate the award the arbitrator held that partial incapacity still continued, and he confirmed an existing award of 11*s.* 3*d.* a week which was made up on the following basis under s. 9, sub-s. 3 (i.) of the Act: Average weekly earnings before the accident, 3*l.* 12*s.*; amount which the workman was earning or able to earn after the accident, 2*l.* 9*s.* 6*d.*; which, deducted from 3*l.* 12*s.* left 1*l.* 2*s.* 6*d.*, one-half the difference being 11*s.* 3*d.* Some time before the application the respondent had enlisted voluntarily in the army. He there received 1*l.* 4*s.* 6*d.* a week pay, of which he had compulsorily to allot 14*s.* to his wife, and rations, washing, uniform, etc., estimated to be of the value of 16*s.* a week, making his total pay 2*l.* 0*s.* 6*d.* a week. Under a special army order dated April 25, 1938, para. 1, the respondent was admitted to a "married establishment," and under para. 10, as he was separated from his wife owing to the

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exigencies of the service, he was granted a " family allowance " of 18*s.* a week, which was paid direct to the wife. The county court judge found that the " cash value of the allowance . . . . "to the respondent " was 9*s.*, which made the total value of his pay, added to the 2*l.* 0*s.* 6*d.*, equal to 2*l.* 9*s.* 6*d.* The appellants contended that the whole of the 18*s.* should be added to his pay which in that case would equal 2*l.* 18*s.* 6*d.* This, deducted from 3*l.* 12*s.*, would leave 13*s.* 6*d.*, one-half of which was 6*s.* 9*d.*, which the appellants said should be the amount of the award.

Blanco White K.C. and *Beney* for the appellants. The whole of the family allowance was part of the amount which the respondent was " earning or is able to earn " within s. 9, sub-s. 3 (i.), of the Workmen's Compensation Act, 1925. In assessing the amount at 9*s.* the county court judge was probably misled by a passage in the judgment of Duke L.J. in *Port of London Authority* v. *Gray* (1), where he speaks of "the cash equivalent of the separation allowance," but the cash equivalent of 18*s.* is 18*s.* That case covers the present case. It was there held by the Court of Appeal that army pay and allowances were earnings within the meaning of the Workmen's Compensation Act, 1906 (now repealed by s. 50, sub-s. 2, and Schedule IV. to the Act of 1925). This family allowance, though no doubt paid direct to the respondent's wife, cannot be distinguished from the 14*s.* compulsorily allotted to her out of his pay. [*Dothie* v. *Robert Macandrew & Co.* (2) was also referred to].

Casswell K.C. and *Myles Archibald* for the respondent. The family allowance was not part of the respondent's army pay and is differentiated therefrom, being the sole subject-matter of a " special army order." At any rate, the whole of it should not be so treated, but only its equivalent, as Duke L.J., who seldom spoke per incuriam, said in *Port of London Authority* v. *Gray* (1). Its proper equivalent was a question of fact for the judge. [Luxmoore L.J. His food, lodging, etc., are not part of his pay. Should they, therefore,

(1) [1919] 1 K. B. 65, 76.

(2) [1908] 1 K. B. 803.

not be taken into consideration ?] The respondent had no right to say " Pay the 18*s*. to me and not to my wife." The earning capacity of a married man is exactly the same as that of a single man. In *Port of London Authority* v. *Gray* (1), the parties had agreed the figures, and the Court was not asked to differentiate between army pay and the family allowance.

SCOTT L.J. This appeal raises a point which has to some extent been previously considered by the Court of Appeal, and is one of some general importance. [His Lordship stated the facts and continued :] The county court judge, for some reason which I am not able to follow, assessed the workman's interest in the 18*s*. allowance as only worth 9*s*. The argument addressed to us, and, I take it, to the learned county court judge, was that the family allowance of 18*s*. was not "earnings" within the meaning of the Act at all and ought to be wholly disregarded. If that argument were right, the learned judge ought not to have assessed the allowance at 9*s*., but should have wholly disregarded it.

Before this Court the argument of Mr. Blanco White, on behalf of the employers, is that the whole of the 18*s*. ought to be taken into account as part of the average weekly amount which the workman " is earning or is able to earn in some "suitable employment or business after the accident," those being the words in the latter part of s. 9, sub-s. 3 (i.) of the Act of 1925. In my opinion, that argument is well-founded. The words which I have just read show that the earnings may be under any contract from any source and are not in any way limited to ordinary contractual wages in an employment by an ordinary employer. The words, in my view, are intentionally meant to include the actual earnings in fact.

The question is whether the family allowance which is given to a married soldier whose wife is living separate from him by reason of the exigencies of the service is " earnings" within the meaning of that provision. It was said on behalf

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(1) [1919] 1 K. B. 65.

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of the workman by Mr. Casswell that there is a distinction in the royal pay warrant between pay and family allowances. That may well be, but that fact is nihil ad rem in considering whether or not the money to which a serving soldier has a title is or is not an earning within the meaning of the Act. The argument addressed to us was based partly on the wording of the two special army orders, one dated April 25, 1938, and the other October 29, 1940, which is supplemental to the main order of 1938. The former order is a royal warrant entitled " Family Allowance for Soldiers." It recites at the beginning that " Whereas provision is made by the King's "Regulations . . . . for the issue of marriage allowance to "soldiers and their families and for the allotment of married "soldiers' quarters or the issue of lodging, fuel and light "allowances in lieu," and the scheme is scheduled to the warrant and provides by para. 1 as follows: " With effect "from April 30, 1938, soldiers serving with the colours on "normal attestations whose pay is issuable from army funds "at rates provided for in the pay warrant, 1931 . . . . and "who have reached the age of 26 years will become eligible "if qualified as provided in these instructions, for admission "to a 'married establishment' which will replace the existing "married quarters roll and marriage allowance roll." Para. 6 provides: " Soldiers on the married establishment "referred to in para. 1 above will be eligible, subject "to the detailed rules and exceptions stated below, for the "following benefits in respect of their families: (i.) A family "allowance, which will supersede the present marriage "allowance and married rates of lodging, fuel and light "allowances." At the end of that paragraph there is this sentence: " The eligibility of individual members of the "families of soldiers on the married establishment for the "benefits under (ii.) (*a*) and (*b*) and (iii.) above will be determined according to the regulations at present governing "the eligibility of members of the families of soldiers on the "married quarters roll." Para. 10 provides: " When a "soldier on the married establishment is separated from his "family in circumstances which, under present regulations, "confer on a soldier on the married quarters roll an entitlement "to accommodation for himself as a single soldier . . . . he "will, under the new provisions, be entitled to accommodation ". . . . and "—this is the material part—" to family allowance "in respect of his family." Para. 11 deals with the details of his entitlement and provides for his receiving the family allowance. The warrant of 1940 deals with rates, but I do not think that it adds to the effect of the warrant which I have read.

The question under those warrants is whether the serving soldier who is entitled to a family allowance is a person who, within the meaning of the Workmen's Compensation Act, 1925, is earning the amount of money represented by the allowance in addition to his pay and the equivalent of pay in kind in the form of fuel, lodging, etc ? To my mind the answer is obvious. He is entitled to it and he does earn it, and none the less so because he is compelled to assent to the condition on which he earns it, namely, that it shall be paid direct to his wife. There is no difference, in my view, between the family allowance which is paid en bloc and the portion of his pay, in this case 14*s.*, which he is obliged to allot to his wife. Apart from any authority, I should have come to that conclusion on the simple wording of the pay warrants in the light of the section of the Act which I have cited.

We were, however, referred to two cases, which I will notice briefly. One was *Dothie* v. *Macandrew* (1) where a captain of a ship trading from London was killed as the result of an accident. His pay was 216*l.* a year, together with food and washing while on board the ship. It was said that the emoluments, when valued, would take his pay above the figure of 250*l.* a year which was the limiting figure at that time for eligibility to workmen's compensation under the Workmen's Compensation Act, 1906, then in force. The learned judge held that his remuneration did not exceed 250*l.*, because those extras should be disregarded. The Court of Appeal pointed out that the learned judge was wrong and

(1) [1908] 1 K. B. 803.

that the test ought not to have been what the captain saved by receiving food, etc., which was the test applied by the learned judge, but what was the actual worth to him of the food, etc., supplied by the employers. Taking the broad view, all of what he received in kind was just as much part of his earnings and remuneration as his cash receipts. The other case was *Port of London Authority* v. *Gray* (1), in which this Court decided that allowances comparable to the allowance of the workman in the present case constituted a part of weekly earnings. In my view, that decision covers the present case and would bind us so to hold even if we had a different view of our own. I think it can be summed up in a sentence of Duke L.J. (2): "It seems to me to follow that the gains of a "voluntarily enlisted private soldier in the present case were "earnings." I think that that really is the whole point. You take into account everything to which the workman is entitled, whether it is in cash or in kind, in order to arrive at a figure of earnings, whether actual or potential, for the purpose of calculating the weekly payment to be made under s. 9, sub-s. 3, of the Act in the case of partial incapacity.

The appeal must be allowed with costs here and below.

MACKINNON L.J. I agree. The question of principle raised here is indistinguishable from that which was argued in *Port of London Authority* v. *Gray* (1). That case, to my mind, is an exact and complete authority which determines this case but was for some reason disregarded by the learned county court judge. Mr. Casswell has made an heroic effort to distinguish that case solely on the ground that Duke L.J. is made to say (3): "the cash equivalent of the separation "allowance." The cash equivalent of 15*s*. or 18*s*. is 15*s*. or 18*s*. I am quite satisfied that Duke L.J. did not mean to say "the equivalent," or by a slip of the tongue was led to say "equivalent," because he had just said that "the "valuation of the rations is agreed." He meant to say

(1) [1919] 1 K. B. 65.
(2) Ibid. 77.
(3) [1919] 1 K. B. 76.

that the cash separation allowance was agreed. If that be so, the sole ground on which it is sought to distinguish that case disappears. It is a clear authority which covers this case.

LUXMOORE L.J. I agree. This case is entirely covered by the decision of this Court in *Port of London Authority* v. *Gray* (1).

Appeal allowed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham.*

Solicitors for respondent: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

(1) [1919] 1 K. B. 65.

W. L. L. B.

DIAMOND *v.* MINTER AND OTHERS.

1941
Feb. 11, 12,
13, 14, 17,
18, 19, 20,
25.

False imprisonment—Fugitive offender from British Dominion—Provisional warrant for arrest—Arrest of wrong person by police officers—No protection afforded by warrant—Reasonable and probable suspicion that offence alleged was one that would be a felony if committed in United Kingdom, and that person arrested had committed it, no defence to action—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *ss.* 2, 4.

A police officer is not justified in arresting a person, without a warrant, on reasonable and probable grounds of suspicion that that person has committed elsewhere an offence which would be a felony if committed within the United Kingdom. A fugitive offender can only be apprehended in the exercise of the powers conferred by the Fugitive Offenders Act, 1881, which by s. 2 provides that a fugitive offender found in any part of His Majesty's dominions may be apprehended under an endorsed or provisional warrant and returned, in manner provided by the Act, to that part of His Majesty's dominions from which he is a fugitive. If under a warrant for the arrest of one person a police officer, by mistake, arrest another person, he is afforded no protection by the warrant against an action for false imprisonment, even although he had reasonable ground for suspecting that the person arrested was the one to whom the warrant related.

Dictum of Brett L.J. in *Reg.* v. *Weil* (1882) 9 Q. B. D. 701, 706 not followed.

Observations in *Brown* v. *Lizars* [1905] 2 C. L. R. 837 considered and followed.

ACTION tried before Cassels J., without a jury.

Claim by the plaintiff, Hyman Richard Diamond, against Detective Inspector Minter and Detective Sergeants Miller and Campbell, of the Metropolitan Police, for damages for false imprisonment.

The facts disclosed by the evidence at the trial, which gave rise to the action, may for the purposes of this report be briefly summarized as follows.

The plaintiff was a well known citizen of New South Wales and there made the acquaintance of one John Woolcott Forbes, a prominent financier in Australia. In January, 1939, Forbes left Australia to escape criminal proceedings with which he was threatened, and arrived at Bombay. There he was arrested as a fugitive offender, but pending extradition proceedings was allowed bail. The plaintiff sailed from Sydney for England on board the *Stratheden* on February 18, 1939, and reached Bombay on March 10. There he met Forbes, whom he entertained on board the ship, and Forbes seized this opportunity to possess himself of the plaintiff's passport and with the help of this passport he was able on March 19 to board a Dutch air liner at Bombay and proceed to Marseilles. The *Stratheden* also called at Marseilles, and there Forbes returned the plaintiff's passport to him without giving any adequate reason for having taken it. From Marseilles the plaintiff travelled overland and finally arrived at the Croydon Airport on March 31.

On March 27 the police received a telegram from Bombay, stating that Forbes was wanted in Sydney for conspiracy, forgery and cheating: that he had been arrested at Bombay, broken bail and absconded, and that it was suspected that he had left Bombay by air. The telegram gave a description of Forbes which, on a casual inspection, would generally fit the plaintiff; and asked for his arrest, if traced. On March 31, the police received two further telegrams, one from Bombay, stating that Forbes had left by Dutch air mail for London on March 19 under the name of Diamond, with passport 208818 issued at Sydney on February 10, 1939 (this being the plaintiff's passport), and the other from Sydney, which gave a short history of the case and also stated that Forbes was carrying that passport, and asked that if he were arrested, he should be well held.

Shortly before 1 P.M. on that day a message was received that a person travelling with that passport in the name of Diamond had arrived at Croydon by air from Paris. The defendants Miller and Campbell were thereupon instructed to contact and follow this man, while the defendant Minter obtained from the Chief Magistrate at Bow Street a warrant for the arrest of Forbes under the Fugitive Offenders Act, 1881, for conspiracy to defraud. The warrant was to arrest Forbes, not Forbes alias Diamond, or Diamond alias Forbes.

Shortly afterwards the defendants Miller and Campbell proceeded to the plaintiff's hotel, and there saw him. The plaintiff at their request produced his passport, and the defendants, believing him to be Forbes, thereupon took him into custody, and brought him to Bow Street Police Station. There the defendant Minter read the warrant to him, and despite the plaintiff's protests that his name was Diamond and not Forbes, detained him at the police station for some time. Later the plaintiff was brought and charged before the Chief Magistrate, who despite the plaintiff's renewed protests that he was not Forbes, remanded him in custody for a week. On the following Monday, April 3, however, the plaintiff again appeared before the Chief Magistrate, represented by counsel and prepared with evidence to prove that he was Diamond and not Forbes. In the meantime the defendant Minter had cabled to Sydney for Forbes's fingerprints, and as these had been received, the case was put back in order that the plaintiff's fingerprints might be taken. This was done and as a result the defendant Minter went into the box and told the Chief Magistrate that he was satisfied that the plaintiff was not Forbes, and the plaintiff was thereupon discharged from custody.

By his statement of claim the plaintiff alleged that on or about March 31, 1939, at the Waverley Hotel, Southampton Row, London, the defendants Miller and Campbell assaulted and took him into custody and wrongfully imprisoned him by forcibly taking him to Bow Street police station, and there detaining him for a considerable time. That the defendant Minter also wrongfully imprisoned him by detaining him at Bow Street police station for the time aforesaid, and by bringing him in custody on the said date before the magistrate at Bow Street police court, and procuring the said magistrate to send the plaintiff to Brixton Prison, where the plaintiff was detained until April 3, 1939, when he was released. The plaintiff claimed, in addition to damages against each of the defendants, a sum of 56*l.* 1*s.* for expenses incurred in respect of solicitor's charges, but the claim for this item of special damage was not persisted in.

The defendants, while not admitting any of the allegations made in the statement of claim, pleaded, alternatively, that they acted on a warrant and were protected by s. 6 of the Constables Protection Act, 1750; that they had reasonable and probable cause for suspecting that one John Woolcott Forbes (the person named in the warrant) had done out of this country that which if done in this country would amount to the felony of forgery, and that the plaintiff and Forbes were the same person; and that at the material time they had reasonable and probable cause for suspecting that the plaintiff without lawful authority was using or had in his possession an irregular passport, contrary to the Aliens Order, 1920.

In the course of the hearing these alternative defences were abandoned, and the defendants were allowed to amend their defence by adding the plea on which they relied, that as police officers they had reasonable and probable cause for suspecting that there had been committed out of this country an offence which, if it had been committed in this country, would have been a felony, and reasonable and probable cause for suspecting that the plaintiff was the person who had committed it.

Geoffrey Howard for the defendants. The defendants had reasonable and probable ground for thinking that a felony had been committed and that the plaintiff and Forbes were the same person. They acted under a provisional warrant given by the Chief Magistrate at Bow Street police station under the Fugitive Offenders Act, 1881. No higher standard should be expected from ministerial than from judicial officers. Even if the warrant was invalid owing to a technical error the defence of reasonable and probable cause is still open. The position of a police constable has altered since *Hoye* v. *Bush* (1); *Walters* v. *W. H. Smith & Son, Ld.* (2). The dominant purpose of the second and third defendants as police officers was to put Forbes into the same position as if he had not broken bail. As to the first defendant, Minter, he had ground for believing the plaintiff guilty of three offences, one of which was a felony, and he acted under the Aliens Order, 1920, art. 18, sub-cl. 4 (*d*). He reasonably suspected the plaintiff of using an irregular passport. The law as stated in *Walters* v. *W. H. Smith & Son, Ld.* (2), is put too high. The statement that a man cannot be arrested unless one is

(1) (1840) 1 Man. & G. 775.

(2) [1914] 1 K. B. 595, 604, 605.

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immediately going to prove a specific charge of felony against him would create a very difficult position in the case of a man on bail. Provided that the offence charged be a felony under English law it is enough to justify the arrest, although in fact the offence be not a felony in the country where it was committed. In *Reg.* v. *Weil* (1) Brett L.J. said: "I doubt much whether a policeman is not justified in "arresting a man without a warrant on reasonable grounds "of suspicion of his having done that which would be a felony "if committed in this country." That is a correct statement of the law. In the case of felonies committed abroad the practice is as a rule to follow the procedure laid down in the Fugitive Offenders Act, 1881; but there is also the power to arrest at common law, and as to that the dominant intention of the defendants was to detain Forbes with a view to sending him back to Australia. The third defendant, Campbell, is entitled to immunity. He was a mere attendant acting under the orders of his superior officer, and had no reason to believe that there was any irregularity.

Valentine Holmes for the plaintiff. Brett L.J.'s dictum in *Reg.* v. *Weil* (1) was wrong, and it is clear that the other judges, Jessel M.R. and Cotton L.J., did not endorse it. The right to arrest without warrant is founded on the common law, and therefore the felony dealt with would be common law felony, i.e., felony committed in this country. In no decision or text book is there a trace of any statement that it is sufficient to prove an offence committed abroad which would have been a felony if committed in this country. The law of extradition, which empowers this Government to deal with offences committed abroad is now purely statutory under the Extradition Acts, 1870–1932, so that the arrest of Weil must have been lawful, and the statement of Brett L.J. (1) unnecessary. " It seems to set at naught the fundamental "principles on which extradition rests, because it denies the "common law right to be at liberty if no offence against the "law of England has been committed. The Extradition Act "provides the only way in which that right may be broken

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(1) (1882) 9 Q. B. D. 701, 706.

"in upon. Where the offence alleged has been committed "against a foreign law, if there is no requisition by the foreign "government, a person may only be arrested on warrant of "apprehension issued by a magistrate or justice on sufficient "evidence laid before him." Piggott on Extradition, p. 91. That is my argument, except that the learned editor takes a narrower view, which is more favourable to the plaintiff in the present case. Where there is a requisition by the Australian government, the Crown in this country is entitled to act upon it, whether with or without the machinery of the Fugitive Offenders Act, but it is only entitled to arrest the person it is required to arrest. If it arrest someone else there is no requisition, and the arrest is wrongful. Even assuming it to be immaterial where the felony has been committed, still the person making the arrest must reasonably suspect that the person whom he actually arrests has been guilty of the felony, and not the person whom he thinks he is arresting. A constable cannot arrest a person merely on reasonable suspicion that he has committed a felony. There must at any rate be reasonable suspicion that the person has committed an actual specific crime, amounting to felony. The constable must have some facts within his own knowledge, or which have been stated to him by another, to justify his suspicion: see Bullen & Leake's Pleadings, 3rd ed., p. 795 [9th ed., 973]. An arrest is wrongful if the person arrested is not told that with which he is charged: *Rex* v. *Howarth* (1); *Mackalley's* case (2). It is admitted here that the plaintiff was not told that he was being arrested for forgery.

[He also referred to *Rex* v. *Ricketts* (3); *Reg.* v. *Bentley* (4); and *Rayner* v. *German* (5).

Howard in reply. *Rayner* v. *German* (5) may be authority for saying that a mere personal resemblance is not sufficient proof of identity, but it does not challenge the proposition that if you have strong grounds for supposing A is B you are justified in arresting him. I am prepared to admit that if the dictum of Brett L.J. in *Reg.* v. *Weil* (1) does not state the law then the only question for the Court is that of damages.

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(1) (1828) 1 Moo. C. C. 207.

(2) (1611) 9 Co. Rep. 65*b*, 68*b*.

(3) (1811) 3 Camp. 68.

(4) (1850) 4 Cox C. C. 406.

(5) (1859) 1 F. & F. 709.

Cur. adv. vult.

1941. Feb. 25. CASSELS J. The plaintiff, a well known citizen of New South Wales, left Sydney on the s.s. *Stratheden* on February 18, 1939, for the purpose of making a long stay in this country. He arrived at Croydon by air from Paris on Friday, March 31, and went to the Waverley Hotel, London. He had been in his bedroom for only a few minutes when two of the defendants, George Arthur Miller and Donald Campbell, Metropolitan police officers, arrested him, honestly believing him to be one John Woolcott Forbes, who was a fugitive offender, and who was said to be wanted by the New South Wales police for forgery and conspiracy to defraud. These two defendants took the plaintiff to Bow Street police station, where the third defendant, Arthur Reginald Minter, a detective inspector of the Metropolitan police force, further detained him, and charged him as a fugitive offender, on a warrant, with conspiracy to defraud in New South Wales. The plaintiff was taken that afternoon before the learned Chief Magistrate, Sir Rollo Graham-Campbell, at Bow Street police court, remanded in custody for six days, and spent Friday night, Saturday and Sunday, and Sunday night, in Brixton Prison. On Monday, April 3, he was again brought before the learned Chief Magistrate. It was clear from the evidence which the plaintiff then called, and from the finger prints of Forbes, which the police had obtained from New South Wales, that a mistake had been made, and that the plaintiff was not Forbes, and he was at once released.

The plaintiff brings this action for damages for false imprisonment against all three Metropolitan police officers. He also claimed special damage in respect of the solicitors' charges which he had incurred to defend himself, but at the end of the case this claim was not pressed, because there was some doubt whether the expense was incurred by reason

(1) 9 Q. B. D. 701, 706.

of the wrongful arrest or by reason of the magisterial order of remand.

[His Lordship then referred to the pleas put forward in the defence, which had been abandoned, and continued :] The case was therefore left in this position: the plaintiff alleging that he had been falsely imprisoned, and the defendants, as constables, pleading that they had reasonable and probable cause for suspecting that there had been committed out of this country that which if committed in this country would have been a felony, and reasonable and probable cause for suspecting that the plaintiff was the person who had committed it.

[His Lordship elaborately reviewed the evidence and stated in detail the facts summarized above, and proceeded :] The fact remains that in arresting the plaintiff the two defendants, Miller and Campbell, arrested the wrong man, and that in detaining the plaintiff at Bow Street police station, Inspector Minter detained the wrong man. The plaintiff has therefore been wrongfully arrested and falsely imprisoned. Can the defendants escape liability? I think that the periods of detention which I have to consider are the period during which the plaintiff was in the custody of the two defendants, Miller and Campbell, and the period during which he was detained at Bow Street police station before he went into the Court. What happened after that, with regard to his being remanded in custody, was the result of a judicial act by the learned Chief Magistrate, and no liability can attach to the police officers for that. It was contended, on behalf of the plaintiff, that as a result of what the defendants did the magistrate remanded the plaintiff in custody under the impression that he was remanding Forbes. I do not accept that contention. The magistrate remanded the man before him, and that was the plaintiff.

What of the liability of the defendants for false imprisonment up to that time? The defendants, finding that the statutory defence of the protection of the warrant did not avail them (see *Hoye* v. *Bush*) (1)) put the warrant on one side and

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(1) 1 Man. & G. 775, 786.

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sought refuge in the contention that they had in fact arrested and detained the plaintiff because they had reasonable ground to suspect that a felony had been committed and that the plaintiff was the man who had committed it. The defendants said that they had the word "forgery" in the cablegram from Bombay. That is true: but what kind of forgery was not stated. Forgery in this country which is not made felony by statute is a misdemeanour. Statutes have made many kinds of forgery felony (see Archbold's Criminal Pleadings, 30th ed., page 813); but there was nothing before the defendants as to the nature of this forgery, and such limited information as there was came not from Sydney, New South Wales (the cablegram from there said "Serious "charge, conspiracy to defraud"), but from Bombay, which was not the place seeking the return of the man Forbes. The defendants had no other information, when they arrested and detained the plaintiff, as to the offence which the plaintiff was supposed to have committed. Conspiracy to defraud is a misdemeanour. Assuming, however, in favour of the defendants, that they arrested the plaintiff because they had reasonable ground to suspect that a felony had been committed, and, further, reasonable ground to suspect that the plaintiff was the man who had committed it, then, if the suspected felony had been committed in this country, the arrest would have been justified. The common law is clearly stated in Bullen & Leake, 3rd ed., at page 795 [9th ed., 973]: "A constable is justified in arresting a person without a warrant "upon a reasonable suspicion of a felony having been committed "and of the person being guilty of it, although no felony has in "fact been committed, and whether the reasonable grounds "for suspicion are matters within his own knowledge or are "facts stated to him by another." In very many cases this has been accepted as the common law: *Beckwith* v. *Philby* (1); *Davis* v. *Russell* (2); *Walters* v. *W. H. Smith & Son, Ld.* (3); and *McArdle* v. *Egan* (4).

Here the defendants go further, and say that they arrested

(1) (1827) 6 B. & C. 635.
(2) (1829) 5 Bing. 354.
(3) [1914] 1 K. B. 595, 602.
(4) (1933) 30 Cox C. C. 67.

the plaintiff for an offence committed abroad, which if committed in this country would have been a felony, and they seek to escape liability in that way. This contention is based upon the following dictum of Brett L.J. in *Reg.* v. *Weil* (1): "I doubt much whether a policeman is not justified in arresting "a man without a warrant on reasonable grounds of suspicion "of his having done that which would be a felony if committed "in this country." This observation of Brett L.J. was the great foundation of the defence in this case, and I have given it careful consideration. Indeed, Mr. Howard, whose conduct of this case on behalf of the defendants leaves nothing to be desired, went so far as to say that if the dictum of Brett L.J. does not state the law relating to arrest by a constable, then the arrest in this case was unjustified, and the only question is one of damages.

Whether the plaintiff was actually arrested on a warrant because the defendants believed him to be Forbes, or whether the plaintiff was arrested because the defendants had reasonable ground for suspecting that he had done something out of this country which, if done in this country, would be a felony, one thing is quite clear, and that is, that he was arrested as a fugitive offender. The apprehension, to-day, of fugitive offenders depends entirely upon the statute, the Fugitive Offenders Act, 1881. Sects. 2 and 4 provide that a fugitive shall be liable to be apprehended and returned in manner provided by the Act; and that a fugitive may be so apprehended under an endorsed or a provisional warrant. A warrant to be endorsed would come from the Dominion from which the fugitive had fled and where he was supposed to have committed the offence. A provisional warrant, which was the kind of warrant issued in this case, is issued by a magistrate on such information as would justify the issue of a warrant if the offence of which the fugitive is accused had been committed within the magistrate's jurisdiction. The power to arrest is obtained, and only obtained, from the statute, and it does not matter whether the offence is felony or misdemeanour.

Brett L.J. uttered his dictum in *Reg.* v. *Weil* (1), in 1882,

(1) 9 Q. B. D. 701, 706.

upon the Extradition Act, 1870, s. 8, which makes the same provision with regard to fugitive offenders from foreign countries. The Fugitive Offenders Act, 1881, had come into operation nearly a year before he uttered his dictum. I can find no other authority for the proposition that a constable in this country can, without a warrant, arrest a person because he reasonably suspects him of having committed out of the country an offence which would be a felony if committed in this country.

Counsel for the defendants referred to *Mure* v. *Kaye* (1), which was the case of an arrest in Scotland by a private person on suspicion of a felony committed in England. The case mainly turned on the insufficiency of the plea, but Heath J. said: "As to the first point, it has generally been "understood, that wheresoever a crime has been committed, "the criminal is punishable according to the lex loci of the "country against the law of which the crime was committed, "and by the comity of nations the country in which the "criminal has been found, has aided the police of the country "against which the crime was committed in bringing the "criminal to punishment. In Lord Loughborough's time "the crew of a Dutch ship mastered the vessel, and ran away "with her, and brought her into Deal, and it was a question "whether we could seize them and send them to Holland; "and it was held we might. And the same has always been "the law of all civilized countries." I do not know whether Heath J. meant that any constable, without a warrant, may arrest in England anybody suspected of felony abroad. It may be that he did: but Stephen J., in his "History of the "Criminal Law," 3rd ed., at page 66, said, with regard to this case: "This faint trace of evidence of any such power "existing by the common law has been entirely superseded by "subsequent legislation. *Mure* v. *Kaye* (1) was seventy years "before the Fugitive Offenders Act." With respect, I agree with Stephen J., but I must deal with the dictum of Brett L.J., because it was uttered after the Act came into force. It was criticized by Sir Francis Piggott in his work on Extradition, published in 1910, at page 91. After citing the passage, that learned editor said: "This seems to set at naught the fundamental principles on which extradition rests, because it "denies the common law right to be at liberty if no offence "against the law of England has been committed. The "Extradition Act provides the only way in which that right "may be broken in upon. Where the offence alleged has "been committed against a foreign law, if there is no requisition "by the foreign government, a person may only be arrested "on warrant of apprehension issued by a magistrate or justice "on sufficient evidence laid before him." In Clarke on Extradition, 3rd ed., p. 202, the author refers to this dictum of Brett L.J. merely as "an intimation." In Biron and Chalmers on Extradition, p. 37, it is stated, in reference to *Reg.* v. *Weil* (1): "In this case Lord Justice Brett expressed an "opinion that a policeman would be justified in arresting a "fugitive criminal without a warrant on reasonable grounds "of suspicion of his having done that which would be a felony "if committed in this country; that is, according to the "laws of arrest in this country. The opinion is given some"what tentatively, and the arrest without a warrant under "this section should not take place save in the most urgent and "exceptional circumstances, and a warrant should be obtained "as quickly as possible afterwards." In Halsbury's Laws of England, Hailsham ed., vol. xiv., p. 529, the dictum is repeated, with the addition of the words "It seems". The dictum is similarly referred to in Clerk and Lindsell on Torts, 9th ed., p. 734, and in the Metropolitan Police Guide; but it is not referred to at all in Salmond on Torts, 9th ed., nor in Russell on Crimes, 9th ed. In Oke's Magisterial Synopsis, 13th ed., 1881, vol. ii., p. 912, it is stated: "By the common law a "person who has committed a felony in any part of Her "Majesty's Dominions abroad, or in a foreign country, whether "he is a British subject or not, or whether we have an extra"dition treaty with such country or not, may be arrested "here or in any part of Her Majesty's Dominions without "warrant and taken before a magistrate to be dealt with

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(1) (1811) 4 Taunt. 34, 43.

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(1) 9 Q. B. D. 701, 706.

"as the law authorises in the respective cases." No authority whatever is cited for that proposition, and I cannot find that it was repeated in the 14th ed. (1893), where the provisions of the Fugitive Offenders Act, 1881, were set out.

The point came up for discussion and decision in the High Court of Australia in the case of *Brown* v. *Lizars* (1). It is not without interest that in the plaintiff's own country of Australia there should be found a decision of the highest Court in that land which is in his favour. It was an appeal from the Supreme Court of Victoria. Brown had been arrested by police-constable Lizars in Victoria. The constable, having verbal information that Brown had told some other person that he had stolen money in South Africa, found in the Victoria Police Gazette the report of an embezzlement of 400*l.* at Durban, Natal, and a description which fitted Brown, and he arrested Brown on that charge of embezzlement—a felony. The magistrate discharged Brown, who brought an action for false imprisonment. A county court jury, in answer to questions put by the judge, found that the plaintiff had an honest belief in the truth of the statement that he had received, and had arrested Brown on suspicion of having committed a felony. The jury gave a verdict for Brown, the plaintiff, for damages. The judge held that there was "reasonable and probable cause," and entered judgment for the defendant, and refused a new trial. The Supreme Court of Victoria upheld the refusal, but on appeal to the High Court of Australia that Court ordered a new trial, and held that (1.) "A reasonable suspicion that a person has, in a "foreign country or in another part of the British Dominions, "committed an offence which, if committed in Victoria, would "be a felony, does not justify a constable in arresting such "person in Victoria without a warrant, and is therefore not "a defence to an action by such person against the constable "for false imprisonment." Griffith C.J. says (2): "The con-"tention on behalf of the defendant, the respondent to this "appeal, is that a constable of police has the same right to "arrest on suspicion of a felony committed in a foreign country,

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(1) [1905] 2 C. L. R. 837.

(2) Ibid. 849.

"or at any rate in another part of the British Dominions, as "he has on suspicion of a felony committed in Victoria or "another State of the Commonwealth. In support of that "contention some ancient authorities—very respectable authorities—were cited, which would deserve great attention if "there were no more to be said about the matter. In particular, reference was made to Chitty's Criminal Law and "Oke's Magisterial Synopsis, which contain passages which "warrant that contention. We had a very interesting argument before us with respect to the foundation of the law of "extradition. There can be no doubt that it was assumed "for many centuries that a sovereign State could extradite "to another country a foreigner found within its territories "for an offence committed within the other sovereign State. "That power was frequently exercised." Then he proceeds to go through the history of extradition, with a passing reference to the observation of Heath J. in *Mure* v. *Kaye* (1), and so far as that is concerned, he says: "The case of *Mure* "v. *Kaye* (1) in 1811 was after that treaty (2), but in it neither "the treaty nor the statute was referred to. In the course "of that case observations were made—particularly by "Heath J.—to the effect that a magistrate may probably issue "a warrant for the arrest of a person charged with an offence "committed in a foreign country." I have looked at the report (1) and I do not find that statement in Heath J.'s observations. The Chief Justice continues: "But in that "case, the question arose as to an offence committed in England "by a person who had gone to Scotland and been arrested "there. Those statements are, after all, mere dicta, and the "case did not proceed upon that ground at all." Then he continues, "In the face of the current of these authorities "and of the course of legislation followed by the Extradition "Acts and the Fugitive Offenders Acts, the former applying "between Great Britain and foreign countries, and the latter "between different parts of the British Empire, it is impossible "to hold that the liberty of individuals can now be interfered

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(1) 4 Taunt. 34.
(2) Extradition Treaty of 1794, with the United States.

"with without the sanction of municipal law. In a case "before the Privy Council, *Walker* v. *Baird* (1), it was con-"tended that the Crown, having the power of making treaties, "could, for the purpose of carrying out a treaty, sanction an "interference with certain private rights without legislative "enactment. The case was argued by the present Lord "Alverstone, then Sir Richard Webster A.-G., and Lord "Herschell, in delivering the judgment of the Court, said: "'The learned Attorney-General, who argued the case before "'their Lordships on behalf of the appellant, conceded that "'he could not maintain the proposition that the Crown "'could sanction an invasion by its officers of the rights of "'private individuals whenever it was necessary in order to "'compel obedience to the provisions of a treaty. The "'proposition he contended for was a more limited one. The "'power of making treaties of peace is, as he truly said, "'vested by our constitution in the Crown. He urged that "'there must of necessity also reside in the Crown the power "'of compelling its subjects to obey the provisions of a treaty "'arrived at for the purpose of putting an end to a state of "'war. He further contended that if this be so, the power "'must equally extend to the provisions of a treaty having "'for its object the preservation of peace, that an agreement "'which was arrived at to avert a war which was imminent "'was akin to a treaty of peace, and subject to the same "'constitutional law.' In the face of those authorities there "is nothing except the statement of a judge of the Court of "Pennsylvania in *Commonwealth* v. *Deacon* (2) that it was the "practice of the English Colonies, before there was any "Statute in the nature of the Fugitive Offenders Act, for one "colony to surrender fugitive offenders from another colony. "It is unnecessary to examine the origin of such a practice, "or to inquire whether the practice was ever objected to, or "whether anything in the nature of extradition between "British colonies ever existed apart from Statute, in the face "of the authorities to which we have been referred." Then, towards the end of his judgment, the Chief Justice says:

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(1) [1892] A. C. 491, 497.

(2) 10 Sergeant & Rawle (Penn.) 125.

"But, even if that proposition were true, it would by no means "follow that any constable could set the law in motion—that "this great prerogative power, supposed to be an incident of "sovereignty, could be put in motion by any constable who "thought he knew the law of a foreign country, and thought "it desirable that a person whom he suspected of having "offended against that law should be surrendered to that "country to be punished. There is therefore no authority "in support of the defence set up in answer to the plaintiff's "claim. The result is that the learned judge of the County "Court ought to have granted a new trial, and that the "Supreme Court should have allowed the appeal from his "refusal to do so. The appeal must therefore be allowed."

Barton J., another member of the Court, in an illuminating judgment, in which he made quotations from Clarke on Extradition, and referred to the dicta of Heath J. in *Mure* v. *Kaye* (1) as an unsafe guide, added, with regard to the case before the Court (2), "It is not even asserted, much less proved, "that the plaintiff's arrest took place in any such way as to "entitle the defendant constable to the protection of the "Fugitive Offenders Act, 1881. There has not been any "warrant, and the claim to be justified in arresting without "one is in itself an abandonment of the protection of the "Act. It is unnecessary therefore to discuss the question "whether the charge before the magistrate of an embezzlement "committed in Natal, without any proof that it is punishable "as prescribed in s. 9, would enable the arresting constable "to rely on that provision of the Act. It seems to me that the "law in this respect qualifies the exercise of the prerogative "to this extent, that apart from the exercise of the treaty "making powers and legislation hereupon, which is matter "between the Empire and a foreign State, the statutory "provisions which regulate municipally the arrest of foreign "offenders, are the only provisions under which the defendant "could have sought for justification, and he has not brought "himself within them."

O'Connor J., the third member of the Court, said: "It is

(1) 4 Taunt. 34.

(2) 2 C. L. R. 837, 861, 866, 868.

"quite clear that a constable of this State cannot justify an "arrest without warrant on the ground that he had a reasonable "suspicion that the person arrested had committed a felony "in South Africa. Mr. Robinson relied on several authorities, "amongst them a passage in Oke's Magisterial Synopsis, "which appeared to support his contention, but the modern "authorities do not support that view, and it can no longer "be taken as a correct statement of the law. The duty "of arrest and surrender of fugitive offenders from other "countries is, as pointed out in Clarke on Extradition, a "matter of international duty, that is, a duty to be carried "out by the Executive. Its origin is in the power of the "Executive—the prerogative power, as it is called,—in "accordance with the comity of nations to surrender fugitives "from justice to their own State. In modern times, no doubt, "the executive government has always had conferred on it "powers from Parliament to regulate the performance of that "international duty. But it has never been decided that "the power has been absolutely taken away from the executive "government to exercise that prerogative right on fitting "occasions. No doubt the tendency of modern times has "been to regulate the right of arrest by statute as almost "every other like power is regulated." Later he said: "This authority to arrest without warrant on suspicion of a "felony which would justify an arrest in this State, can have "no application where the offence is committed outside this "State, whether in a foreign country or in some other British "possession. There are many cases in which an arrest can "be made for an offence committed in another country, but "then the ordinary course under the Fugitive Offenders Acts "or the Extradition Acts must be followed. There is ample "provision for carrying out these international agreements "made between different British possessions or between the "British Empire and foreign countries, in those Acts which "provide a special procedure which must be followed. But "these Acts, if they are applicable, have not been applied "in this case, and on the principles of the common law I can "see no justification whatever for this arrest."

I have read these judgments, or passages from them, with interest. I am not bound by them; but, with respect, I agree with them. I am unable, therefore, to act upon the dictum of Brett L.J. in *Reg.* v. *Weil* (1).

The Fugitive Offenders Act, 1881, has made provision for the course to be adopted in the arrest of fugitive offenders. They can only be lawfully arrested and detained upon either an endorsed or provisional warrant. The whole matter of the arrest of fugitive offenders is, in my view, now regulated by Statute, and the defendants have no protection in law for the arrest of the plaintiff. If necessary, I should hold as a fact that they did not even arrest him or detain him because they thought he had been guilty of that which, if committed in this country, would have been a felony. What they did was to arrest and detain him on the warrant, and it was not a warrant to arrest and detain him, but a warrant to arrest and detain somebody else, namely, John Woolcott Forbes. When it was discovered that a mistake had been made, the defendants sought refuge behind the one word "forgery," in the cablegram from Bombay. The plaintiff was never told that he was being arrested for forgery, and some authorities were cited to me to support the contention that that omission alone would make the arrest unlawful: see *Mackalley's* case (2); *Rex* v. *Howarth* (3); and Clerk and Lindsell on Torts, p. 742; but I do not decide the case upon that ground.

An instance of mistaken identity in arrest is to be found in *Fisher* v. *The Oldham Corporation* (4), where, on a request from the Oldham police, a Metropolitan police officer arrested one man in mistake for another and handed him over to an inspector of the Oldham police. The plaintiff in that case sued the corporation, and it was held that the police were not the agents of the corporation, and the action therefore failed. The case is not in point here, beyond one thing: that it was admitted, for what it is worth, that there was a case of false imprisonment against an appropriate defendant.

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(1) 9 Q. B. D. 701, 706.

(2) 9 Co. Rep. 65*b*, 68*b*, resolution 4.

(3) 1 Moo. C. C. 207.

(4) [1930] 2 K. B. 364, 366.

I think the defendants in the present case made an honest mistake, and I am satisfied that each of them thought he was carrying out his duty. I think, further, that much of the trouble might have been averted by a different attitude on the part of the plaintiff. He was doubtless indignant, and rightly so; but if he had made clear at the very beginning that his passport had been stolen from him at Bombay by the real offender Forbes, I am satisfied that the defendants would have caused inquiries to be made immediately which would have saved the plaintiff much of the inconvenience to which he was put. By this very full investigation, however, the plaintiff's character has been vindicated.

The question of damages therefore arises. I do not award damages for the plaintiff's detention in Brixton Prison, for that, as I have said, was the result of a judicial decision. The breaking of the chain of causation was dealt with by Scrutton L.J. in *Harnett* v. *Bond* (1), where the Lord Justice said: "But it appears to me that when there comes in the "chain the act of a person who is bound by law to decide a "matter judicially and independently, the consequences of his "decision are too remote from the original wrong which gave "him a chance to decide."

I think a fair sum would be 110*l.*; 50*l.* against each of the defendants Minter and Miller, and 10*l.* against the defendant Campbell, whose part in the affair was, after all, a very minor one. I therefore give judgment for the plaintiff for the sum of 110*l.*, divided as I have said, with costs.

Solicitors for the plaintiff: *A. Kramer & Co.*

Solicitor for the defendants: *Solicitor for the Metropolitan Police.*

(1) [1924] 2 K. B. 517, 565.

A. W. G.

LANCASTER MOTOR COMPANY (LONDON), LIMITED, v. BREMITH, LIMITED.

C. A.
1941
April 1.

BARCLAYS BANK, LIMITED (GARNISHEES).

Company—Liquidation—Costs of unsuccessful action payable by company —Attachment—Banker—Claim to garnishee—Liquidator's banking account.

When an action brought by a company in liquidation is dismissed with costs, the Court will not attach the liquidator's banking account in garnishee proceedings for the payment of the costs. It is only in respect of a debt owing to a judgment debtor by a third party that a garnishee order will be made, and, since a company and its liquidator are separate entities, money standing to the credit of the liquidator's banking account is not a debt owing to the company.

Gerard v. *Worth of Paris, Ld.* [1936] 2 All E. R. 905 not followed.

APPEAL from His Honour Judge Thomas sitting at the Mayor's and City of London Court.

On November 18, 1940, judgment was given in an action brought by Bremith, Ld., a company in liquidation, against Lancaster Motor Company (London), Ld. (hereinafter called the "judgment creditors"), dismissing the action with costs that were taxed at 28*l.* 19*s.* 4*d.* On December 31, 1940, the judgment creditors issued a garnishee summons against Barclays Bank, Ld., for payment of this sum with costs as therein mentioned, the claim being to garnishee the account standing in the name of Henry Charles Treby as liquidator of Bremith, Ld., in respect of the sum claimed. The bank paid 31*l.* 17*s.* 5*d.* into Court. On February 11, 1941, the matter came before the county court judge and the liquidator contended that there was no debt due from the bank to Bremith, Ld., which could be the subject of a garnishee order. The county court judge held that, for the judgment creditors to obtain a garnishee order absolute against the bank, there must be a debt owing by the bank to Bremith, Ld.; that the customer of the bank was Henry Charles Treby; and the fact that he was described as liquidator for Bremith, Ld., did not create a debt by the bank to Bremith, Ld., whose

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corporate status and corporate powers continued after the appointment of the liquidator until they were dissolved. It was clear from *Klauber* v. *Weill* (1) that the company and the liquidator were separate entities. See also *Spence* v. *Coleman* (2); *Plunkett* v. *Barclays Bank, Ld.* (3). He, therefore, held that the judgment creditors were not entitled to recover against the bank. The judgment creditors appealed.

R. Lane Mitchell for the appellants. The appellants are entitled to a garnishee order on the liquidator's account in respect of these costs which became payable in an action by the liquidator in the name of the company: *Gerard* v. *Worth of Paris, Ld.* (4). In that case the judgment of Slesser L.J., with which Romer L.J. agreed, shows that it makes no difference that the debt is due from the company and the banking account in the liquidator's name. It is true that the point does not appear to have been argued there, but the decision on it was necessary to enable the Court of Appeal to decide as it did. [GODDARD L.J. referred to *Hirschorn* v. *Evans* (5).] In that case different considerations applied and an account standing in the joint names of a husband and wife was held not capable of being attached to satisfy the husband's debt. A garnishee order will lie in respect of costs incurred in unsuccessful litigation by a company in liquidation in priority to the costs of the liquidation: *In re Pacific Coast Syndicate, Ld.* (6). [SIR WILFRID GREENE M.R. The language of Order XLV., r. 1, establishes that the debt attached must be owing to the judgment debtor.] The bank knew that the liquidator's account was in his name as liquidator of the company and it differs from *Plunkett* v. *Barclays Bank, Ld.* (3) in this respect. Further, the action in which the costs in question became payable was an action by the liquidator in the name of the company. [He also referred to *Klauber* v. *Weill* (1).]

T. J. F. Hobley, for the liquidator, was not called on to argue.

(1) (1901) 17 Times L. R. 344.
(2) [1901] 2 K. B. 199.
(3) [1936] 2 K. B. 107
(4) [1936] 2 All E. R. 905.
(5) [1938] 2 K. B. 801.
(6) [1913] 2 Ch. 26.

SIR WILFRID GREENE M.R. [after stating the facts :] Speaking quite apart from authority, I should have thought that this appeal was hopeless. Under Order XLV., r. 1, a garnishee order nisi can be made on an affidavit that any third person is indebted to the judgment debtor and the order will be that all debts owing or accruing from that third person to the debtor shall be attached to answer the judgment or order. Here the money held by the bank was not owing to the judgment debtors. The judgment debtors were the company and the account was in the name of the liquidator. The liquidator alone could sue the bank. His cheque alone would be honoured. There was no relationship of banker and customer or debtor and creditor between the bank and the company.

I should have thought, as I have said, that the appeal could not succeed, but Mr. Mitchell refers us to the decision of this Court in *Gerard* v. *Worth of Paris, Ld.* (1). There a company went into voluntary liquidation, the liquidator discharged the manageress, and she sued the company for wrongful dismissal and obtained judgment in default of defence. She then applied for a garnishee order on a bank account in the name of the liquidator. There was no evidence of any other claims on the company. The Master refused to make the order absolute, but the judge in chambers reversed his decision. There were several points argued in the case, but the point on which the parties appeared to be anxious to have a decision was the question of the priority of the claimant's debt. So far as the report shows, no argument was addressed to the Court on the question whether or not, in view of the fact that the account was in the name of the liquidator, a garnishee order could properly be made. I cannot help thinking, on reading the report, that that point was deliberately passed sub silentio by counsel in order that the point of substance might be decided.

Nevertheless, it is fair to say that the point had to be decided by the Court before it could make the order which it did, because it had to decide whether the order of the judge should

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(1) [1936] 2 All E. R. 905.

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stand or the order of the Master should be restored. There were two members of the Court sitting, Slesser L.J. and Romer L.J., and the only material passage in the judgment (which was the judgment of Slesser L.J., Romer L.J. not delivering an independent judgment) is to the following effect (1): " The Master appears to have taken the view that, "in so far as the debt was owing to the company and the "account was in the name of the liquidator, there was a "difficulty in proceeding by garnishee order. In my view "the learned Master, if that was his view, was mistaken. "If all other requirements were satisfied and the lady was "entitled to garnishee that account of the company, the "mere fact that it stood in the name of the liquidator does "not seem to me to effect any difference in her rights." With all respect to the learned Lord Justice who delivered that judgment, and to Romer L.J., who agreed with it, I cannot consider that this Court is bound to follow it. It was delivered without argument, without reference to the crucial words of the rule, and without any citation of authority. Accordingly, I do not propose to follow these observations, because it seems to me that they are wrong in principle and are not to be justified when the language of the rule and the ordinary principles which govern the relationship of banker and customer are considered.

It is worth noticing that in the later case of *Hirschorn* v. *Evans* (2) Slesser L.J. delivered a judgment, as one of a majority consisting of himself and MacKinnon L.J., the reasoning of which appears to me to be quite inconsistent with the previous decision to which he had been a party in *Gerard* v. *Worth of Paris, Ld.* (3). In *Hirschorn* v. *Evans* (2) a husband and a wife had a bank account in their joint names and it was held by Slesser L.J. and MacKinnon L.J., Greer L.J. dissenting, that " inasmuch as the debt which the bank "owed was not a debt due to the husband alone but to him "jointly with his wife, it could not be attached to answer "the judgment against the husband." That seems to me, if

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(1) [1936] 2 All E. R. 905, 909.

(2) [1938] 2 K. B. 801.

(3) [1936] 2 All E. R. 905.

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I may say so, to be in accordance with principle in these matters. The crucial matter to be observed is what is the relationship of the alleged debtor to the judgment debtor. That relationship must be one of debtor and creditor and unless it falls within that description the rule does not apply. That aspect of the matter was fully gone into by Slesser L.J., and MacKinnon L.J. did not dissent from that view. In fact he took the same view himself.

In those circumstances, I feel that I am justified in the course which I propose to take and that is of saying that, in my opinion, this appeal must be dismissed.

CLAUSON L.J. I agree, for the same reasons as have been given by the Master of the Rolls.

GODDARD L.J. I agree. I will only add that I do not think that Greer L.J., in his dissenting judgment in *Hirschorn* v. *Evans* (1), in any way questioned the principle on which we are acting. He differed solely on the application of that principle to the peculiar circumstance of that case, having regard to the fact that there was in that case an arrangement by which either the husband or the wife could draw cheques on the joint account. This fact, in his opinion, justified garnishee proceedings in respect of the husband's debt. His judgment in no way questioned, indeed it assumed the correctness of, the rule which we are affirming, and which in fact was affirmed by *Hirschorn* v. *Evans* (1), which was subsequent in date to *Gerard* v. *Worth of Paris, Ld.* (2).

Appeal dismissed.

Solicitor for appellants: *J. Hampson Fogg.*
Solicitors for liquidator: *J. E. Baring & Co.*

(1) [1938] 2 K. B. 801. (2) [1936] 2 All E. R. 905.

H. C. G.

1941
Feb. 24.

BRUETON *v.* WOODWARD.

Limitation of action—Gaming—Cheques given for racing bets—Action for repayment—Cause of action arising before Gaming Act, 1922—*Writ issued after Act—Right to recover—Claim barred by lapse of time—Gaming Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 41), *s.* 2—*Gaming Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 19), *s.* 1—*Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-ss.* 1 (*d*), 3.

The plaintiff, a bookmaker, had in June, 1922, paid by cheques certain horse-racing bets which he had lost to the defendant. By writ dated August 10, 1940, he brought the present action to recover from the defendant, under and by virtue of s. 2 of the Gaming Act, 1835, the value of the cheques :—

Held, that the right of action given to the plaintiff by s. 2 of the Act of 1835 was not destroyed by the repeal of that section by s. 1 of the Gaming Act, 1922, as it had accrued before July 20, 1922, the date on which the Act came into operation, although proceedings to enforce the right had not been commenced until long after that date.

Decision of McCardie J. in *Henshall* v. *Porter* [1923] 2 K. B. 193, followed.

Held, further, that the plaintiff was suing under and by virtue of the provisions of an enactment, and, therefore, the action was barred by s. 2, sub-s. 1 (*d*), of the Limitation Act, 1939, by which the period of limitation was fixed at six years, or, if sub-s. 1 (*d*) of s. 2 did not apply, the debt sued for was a specialty covered by s. 2, sub-s. 3, of the Act of 1939, and, therefore, barred after twelve years.

ACTION tried before Singleton J. without a jury.

The plaintiff, Horace Joyner Brueton, was a bookmaker and by the statement of claim endorsed on the writ claimed against the defendant the sum of 239*l.* 10*s.* being the amount recoverable from the defendant under and by virtue of the provisions of the statute 5 & 6 Will. 4, c. 41, s. 2 (1), in respect of certain cheques paid by the plaintiff to the defendant in payment of bets on horse-races, which the plaintiff lost to the defendant. The total amount was made up by cheque for 45*l.* drawn on June 19, 1922, and another for 194*l.* 10*s.* drawn on June 24 of the same year.

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(1) The Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 2 : "And be it "further enacted, that in case any "person shall, after the passing "of this Act, make, draw, give, "or execute any note, bill, or "mortgage for any consideration "on account of which the same "is by the hereinbefore recited "Acts . . . . declared to be void, "and such person shall actually "pay to any indorsee, holder, or "assignee of such note, bill, or "mortgage the amount of the "money thereby secured, or any "part thereof, such money so "paid shall be deemed and taken "to have been paid for and on "account of the person to whom "such note, bill, or mortgage was

The defendant, by his defence, denied that the sum of 239*l.* 10*s.*, or any part thereof, was recoverable under the provisions of s. 2 of the Gaming Act, 1835, and pleaded that the amount sued for was irrecoverable in law by reason of the provisions of the Gaming Act, 1922 (1), which by s. 1 repealed s. 2 of the Act of 1835, or, alternatively, that the alleged debt, if any, was barred by the Limitation Act, 1939.

It was admitted at the trial that the cheques had been given in payment of betting losses.

H. H. Hanworth for the plaintiff. Sect. 1 of the Gaming Act, 1835, declares securities given in respect of gaming transactions to have been given for an illegal consideration, and s. 2 entitles any person who has given securities in respect of such illegal transactions to recover the value of them as a debt due and owing from the person to whom the securities were originally given. By s. 1 of the Gaming Act, 1922, s. 2 of the Act of 1835 is repealed. Sect. 1 of the Act of 1922 has been the subject of a good deal of judicial interpretation, and it seems clear that no cause of action which did not arise

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“ originally given upon such “ illegal consideration as aforesaid, “ and shall be deemed and taken “ to be a debt due and owing from “ such last-named person to the “ person who shall so have paid “ such money, and shall accord- “ ingly be recoverable by action “ at law in any of His Majesty's “ Courts of Record.”

(1) The Gaming Act, 1922 (12 & 13 Geo. 5, c. 19.) s. 1 : “ Section “ two of the Gaming Act, 1835 “ (which makes money paid to the “ indorsee, holder, or assignee of “ securities given for consideration “ arising out of certain gaming “ transactions recoverable from “ the person to whom the securi- “ ties were originally given), is “ hereby repealed. No trustee, “ executor, or other person acting “ in a representative or fiduciary “ capacity shall be under any “ obligation to make or enforce “ any claim under the said section “ in respect of any transaction “ completed before the passing of “ this Act, or be liable for any “ breach of duty by reason of “ any failure to do so. No action “ for the recovery of money under “ the said section shall be enter- “ tained in any court.”

before July 20, 1922, when the Gaming Act of that year came into operation, would be enforceable. In *Bowling* v. *Camp* (1), in which the cause of action arose and proceedings were initiated before July 20, 1922, but the trial did not take place until after the Act of 1922 had come into operation, McCardie J. held that the claim was nevertheless enforceable. A like decision was given by the Court of Appeal in *Beadling* v. *Goll* (2). Further, in *Henshall* v. *Porter* (3), in which proceedings had not been commenced until after the Act of 1922 had come into force, although the cause of action had accrued before that date, McCardie J. held that the right of action given by the Act of 1835 was not destroyed by the Act of 1922. As to the defence that the claim is barred by the Limitation Act, 1939, that Act is not retrospective and does not apply. There can be no question of a contract here. This is an action on a statute and the period of limitation is twenty years: *Shepherd* v. *Hills* (4).

C. L. Henderson for the defendant. The action is barred by the Limitation Act, 1939. Even if the Act of 1939 does not apply the claim is barred under the Limitation Act, 1623, the material provisions of which are repealed and re-enacted in a slightly different form by the Act of 1939. It is quite clear from the provisions of the later statute that it is intended to have a retrospective effect. It received the Royal Assent on May 25, 1939, but by s. 34, sub-s. 2, it was not to come into operation until July 1, 1940. It is manifest that the time which elapsed between those two dates was intended to safeguard the position of those whose right of action would be barred by the provisions of the Act, but was not barred by the provisions of the then existing Acts owing to the longer period of limitation. The present claim is an action to recover a "sum "recoverable by virtue of any enactment," within the meaning of s. 2, sub-s. 1 (*d*), and is therefore barred after six years from the date on which the cause of action accrued. It is not an action upon a statute, but it is an action to enforce a cause of action given by a statute. In *Gutsell* v. *Reeve* (1) the Court of Appeal drew a careful distinction between an action on a statute and a cause of action given by a statute. Even if the present claim is an action on a specialty it is equally barred, because the period of limitation has been reduced to twelve years by s. 2, sub-s. 3.

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(1) [1922] W. N. 297; 39 Times L. R. 31.

(2) (1922) 39 Times L. R. 128.

(3) [1923] 2 K. B. 193.

(4) (1855) 11 Ex. 55.

SINGLETON J. stated the facts as set out above and after reading s. 1 of the Gaming Act, 1922, proceeded: The last sentence of the Act of 1922 is somewhat obscure, following as it does the other words that I have read, and the question at once arose whether the rights given by the Act of 1835 were taken away by the Act of 1922 in cases where the cause of action under the former had accrued before the passing of the latter Act. The conditions under which this question may arise are necessarily various, as was pointed out by McCardie J., who tried a number of these cases, in *Bowling* v. *Camp* (2). The first case cited to me was *Brookes* v. *Brown* (3) which was tried before Acton J. His decision was arrived at after consultation with Greer J., who at Leeds Assizes had delivered his judgments in *Beadling* v. *Goll*, which subsequently came before the Court of Appeal (4). The cases before McCardie J. were, firstly, *Bowling* v. *Camp* (2) and, secondly, *Henshall* v. *Porter* (5). The latter case was the only one which dealt with the position which arises in this case, i.e., the right of action accruing before the passing of the Act of 1922, but proceedings not being brought until after the passing and coming into force of that Act. In such a case, McCardie J. decided, the right of action given by the Act of 1835 was not destroyed. It is as well to notice that in the Court of Appeal in *Beadling* v. *Goll* (4), although Bankes L.J. and Warrington L.J. appear to have dealt with the matter generally, Scrutton L.J., in the course of his judgment, said that "It was a pity that Parliament and those "who advised Parliament did not see that the matter was

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(1) [1936] 1 K. B. 272, 289.

(2) [1922] W. N. 297; 39 Times L. R. 31.

(3) 39 Times L. R. 3.

(4) 39 Times L. R. 128, 129.

(5) [1923] 2 K. B. 193.

"made clear. To his knowledge a question was put down "to be asked of the Law Officers as to the effect of the Act, "but the question was not allowed to be put. It was a great "pity that legislation was carried on in this way on a point "which any lawyer must have foreseen would arise and on "which the wording of the Act was left in deliberate obscurity. ". . . . All that he decided on the present occasion was that "the Act was not retrospective in regard to actions commenced "before the passing of the Act and in which judgment had "not been given when the Act came into force." He deliberately kept open the question whether the right of action survives if the action has not been commenced before the coming into force of the Act of 1922; but, as I have said, McCardie J. answered that question in the affirmative in *Henshall* v. *Porter* (1). I confess that but for that decision, in view of the words "No action for the recovery of money "under the said section shall be entertained in any court," I should have felt very grave doubt on the matter, but since McCardie J., in his judgment, went into the matter very fully, and carefully considered the rule of law and in particular s. 38 of the Interpretation Act, 1889, I think it but right to follow it.

In the present case the cause of action had already accrued, because the cheques were paid on or about June 19 and 24, 1922, respectively and Mr. Hanworth has asked me to give judgment in the plaintiff's favour. Mr. Henderson, although I think he would prefer to keep open the question whether the Act of 1922 took away the plaintiff's right of action, has not argued the point. He really bases his case on para. 4 of the defence and contends that the claim is barred by the Limitation Act, 1939. That Act is entitled "An Act to "consolidate with amendments certain enactments relating "to the limitation of actions and arbitrations." Amongst other alterations of the law which it makes, in certain cases it substitutes a different period of limitation, sometimes shorter, sometimes, as in the case of actions against public authorities, longer for the period which existed previously.

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(1) [1923] 2 K. B. 193.

It provides by s. 2, sub-s. 1, that "The following actions "shall not be brought after the expiration of six years from "the date on which the cause of action accrued, that is to "say: . . . . (*d*) actions to recover any sum recoverable by "virtue of any enactment, other than a penalty or forfeiture "or sum by way of penalty or forfeiture." Mr. Henderson's submission was that that sub-section applies to this case; that the amount claimed by the plaintiff may be described as money or a sum "recoverable by virtue of any enactment," i.e., by virtue of the Act of 1835. Alternatively, he relied on sub-s. 3 of s. 2, which provides that "An action upon a specialty "shall not be brought after the expiration of twelve years "from the date on which the cause of action accrued."

Mr. Hanworth, on the other hand, submitted that the Act of 1939 does not apply; that the present action is one brought upon a statute, and that it is clear from the decision in *Shepherd* v. *Hills* (1) that for such actions the period of limitation is that fixed by s. 3 of the Statute of Limitations, 3 & 4 Will. 4, c. 42, namely, twenty years. Mr. Henderson's answer was that this was not an action upon a statute, and he drew my attention to the decision of the Court of Appeal in *Gutsell* v. *Reeve* (2), and in particular to the judgments of Lord Wright M.R. and Romer L.J. In so doing he read the following passage at the commencement of the judgment of Romer L.J.: "The question which arises upon this appeal "may be stated in this way: Is the plaintiff bringing an action "on the statute of 1924, or is he merely suing in respect of a "cause of action given to him by that statute?" Romer L.J. then drew attention, as Lord Wright had done, to the distinction between an action on a statute and a cause of action given by a statute. Mr. Henderson submitted that under s. 2 of the Act of 1835 what the plaintiff was claiming was a debt owing by the defendant to the plaintiff, that the right is declared, but that it is stated in the statute that it is to be regarded as a debt. He contends that the plaintiff is not suing on a statute, but is merely seeking to enforce a cause of action given to him by a statute.

(1) 11 Ex. 55.

(2) [1936] 1 K. B. 272, 288.

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Singleton J.

I do not think that the decision in *Gutsell* v. *Reeve* (1) really helps me in this case. Each case must, of course, depend upon its own facts, and the exact terms of the statute in question. The writ claims the money as being the amount recoverable under and by virtue of the provisions of s. 2 of the statute 5 & 6 Will. 4, c. 41. It is true that that does not determine the matter, but the right to sue, and indeed everything connected with it, is created by s. 2 of the Act of 1835, and it is properly described, I think, as suing under and by virtue of the provisions of that Act. If that is so the period of limitation is now six years by reason of s. 2, sub-s. 1 (*d*), of the Limitation Act, 1939, which came into operation on July 1, 1940. It is unnecessary to consider it more closely because, if that sub-section does not apply, the debt is a specialty covered by s. 2, sub-s. 3, of the Limitation Act and the period of limitation is twelve years. It is indeed agreed that if the Act of 1939 applies the plaintiff's action is barred.

Mr. Hanworth's argument was that the Act did not apply at all to this class of case, because otherwise, as McCardie J. said in dealing with the questions raised by the Gaming Act, 1922, it would be taking away private rights, and Parliament had not made it clear that that was what it intended. I do not think that any rights would be taken away. The Act received the Royal Assent on May 25, 1939, but it was provided by s. 34, sub-s. 2, that the Act should not come into operation until July 1, 1940, some thirteen or fourteen months later. In that interval any one whose period of limitation otherwise might be shortened was afforded time within which to start his action and safeguard his right. Consequently no existing right was interfered with, provided the person who had that right did that which he could do, namely, commenced his action before July 1, 1940. Moreover, by s. 33 it is provided that "Nothing in this Act shall . . . . (*b*) affect any "action or arbitration commenced before the commencement "of this Act or the title to any property which is the subject "of any such action or arbitration." Therefore no rights are taken away.

(1) [1936] 1 K. B. 272.

The present plaintiff commenced his action on August 10, 1940. The cause of action, according to him, accrued in June, 1922. If it is an action upon a specialty, the plaintiff could have protected himself by commencing his action at any time before the Act of 1939 had come into operation. He did not do so, and I therefore hold—and that without regret—that the action is barred, and consequently give judgment for the defendant.

Solicitor for the plaintiff: *Leslie Marrison.*

Solicitors for the defendant: *W. H. Bellamy, for Thomas Coates & Ensor, Birmingham.*

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March 5, 6;
April 8.

WILKINSON *v.* REA, LIMITED, AND OTHERS.

[1939. W. 2026.]

Factory—Public dry dock—Ship—Accident to workman employed by repairing company—Fall down open hatch—Hatch open for delivery of coal—Electric equipment of ship being tested—Temporary extinguishment of lights—Insufficient warning to injured workman—"Occupier"—Whether repairing company—Liability of shipowners—Breach of statutory provision—Negligence—Shipbuilding Regulations, 1931 (*St. R. & O.*, 1931, *No.* 133), *Heading "Duties"; regs.* 42 (*a*) *and* (*b*).

A ship was lying in public dry dock while coal was being delivered by coal merchants for use in the galley, which involved having a hatch in the galley open. Trifling repairs were also being done in the galley and elsewhere in the ship by a company (called the "repairing company"). While the coal was being delivered the electric lighting in the galley was temporarily extinguished at the request of a Lloyds' surveyor who was testing the electric lighting equipment. The surveyor had been accompanied by an employee of the repairing company who communicated the surveyor's wishes to the ship's engineer and he extinguished the lights. The plaintiff, an employee of the repairing company, entered the galley to fetch his tools while the electric lights were out and he fell down the hatch and was injured in spite of an attempted warning by an employee of the coal merchants. The plaintiff, therefore, brought this action claiming damages for personal injuries against the coal merchants, the shipowners and the repairing company. As against the coal merchants the action succeeded, but as against the shipowners and the repairing company the action was dismissed and the plaintiff was ordered to pay their costs. On appeal by the coal merchants and the plaintiff:—

Held, (1.) that the appeal of the coal merchants failed; (2.) that the repairing company were not, by reason of their being employed to carry out some small repairs in the ship, the "occupier" within the meaning of the provision headed "Duties" in the Shipbuilding Regulations, 1931, and had not had imposed on them the duty under reg. 42 (*a*) of keeping all parts of the ship efficiently lighted when work was being done, and consequently that they were not liable for breach of the regulation, and had not been guilty of any negligence; (3.) that the shipowners who, under exception (*c*) to the provisions under the heading "Duties," were responsible for complying with reg. 42 (*b*), which required that all approaches to places to which an employee might be required to proceed in the course of his employment should be adequately lighted, had, in allowing the lights to be put out while work was being done without giving any warning, been guilty of the breach of a

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statutory duty which was absolute; and (4.) that there was no ground for joining the repairing company as defendants and that the plaintiff must pay their costs without having a right to repayment of the amount by the unsuccessful defendants.

Per Luxmoore L.J. (1.) The word "occupier" in the Shipbuilding Regulations, 1931, means the occupier of the dry dock as stated by Lord Atkin in *Smith* v. *Cammell, Laird & Co.* [1940] A. C. 242, 256. (2.) The repairing company had not agreed with the shipowners to repair the vessel, but only to do certain parts of the repair work which was being carried out on the ship while in dock, and they could not, therefore, be deemed to be the "occupiers" of the dry dock at the time of the accident. (3.) The shipowners were also liable to the plaintiff for negligence at common law.

The plaintiff was a workman in the employment of the defendants A. & R. Brown, Ld., a firm of contractors, who in May, 1939, were carrying out various voyage repairs on the motor vessel *Linnell*, owned by the defendants Lamport & Holt, Ld., and at the time lying in the Bidston dock at Birkenhead, which was a public dry dock within the meaning of the Shipbuilding Regulations, 1931, manned by a skeleton crew. On the day of the accident they were executing some trivial repairs in the ship's galley and the defendants Rea, Ld., were at the same time engaged in delivering coal into a bunker under the galley through a hatch or scuttle, which their workmen had uncovered for this purpose, and their foreman was superintending the operation of delivering the coal. The scuttle was just abaft the doorway between the galley and the starboard alleyway. The galley, like other parts of the ship, was lit by electric light, but in the morning of May 5 a Lloyd's surveyor, attended by an employee of A. & R. Brown, Ld., who transmitted his orders to the ship's engineer, was testing the electrical installation, and in pursuance of his order the ship's engineer switched off that portion of it which provided the light for the galley, thus leaving the galley in darkness. The plaintiff at this moment was on his way to fetch his tools and for this purpose he had to pass from the alleyway through the galley. The foreman of Rea, Ld., heard him approaching and appreciating the danger attempted to stop him from entering the galley, but the plaintiff, not fully realizing the position and not appreciating what exactly the foreman was endeavouring to do, pushed by him, proceeded into the galley and fell into the open hatch or scuttle, and suffered injury.

By his statement of claim the plaintiff alleged that at the time of the accident the shipowners or A. & R. Brown, Ld., or both of them, were in occupation and control of the ship and provided the lighting on board, and that he met with the accident owing to the negligence of Rea, Ld., and/or the negligence and/or breach of statutory duty of A. & R. Brown, Ld., and/or the shipowners. The statutory breaches said to arise under the Shipbuilding Regulations, 1931, were of regs. 42 (*a*) and 42 (*b*) (1.).

Stable J. held that the presence of the open scuttle near to the doorway constituted a trap and that the warning provided was inadequate, that the plaintiff was not guilty of contributory negligence, and accordingly that the action against Rea, Ld., succeeded ; but that on whichever of the other two defendants was imposed the duty to light under regs. 42 (*a*) and 42 (*b*) the duty had been discharged by the provision of an adequate and sufficient system of lighting. The regulations could not mean that the light had to be kept on permanently, so as to create a breach of statutory duty if for some purely temporary reason there was a momentary cessation of light. In any case, even if the absence of light was a causa sine qua non of the accident, which he doubted, it was not the causa causans.

(1) Shipbuilding Regulations, 1931 (St. R. & O., 1931, No. 131). "Duties : It shall be the duty of "the occupier to comply with "Parts I. and VIII. of these "Regulations. Provided that, "when a ship is being repaired in "a public dry dock the person "who contracts with the owner or "with his agents to execute the "work of repair shall be deemed "to be the occupier for the "purposes of Parts I. to VIII. "and it shall be his duty to "comply with such Parts, except "as follows :— . . . . (*c*) where "the shipowner provides the "lighting on board the ship it shall "be the duty of the shipowner "master or officer in charge to "comply with reg. 42 (*b*) so far as "regards the lighting of the ship "which he has undertaken to "provide."

Reg. 42 (*a*) : "All parts of a "ship where work is being carried "on shall be efficiently lighted."

Reg. 42 (*b*) : "All approaches "to such parts and to places to "which a person employed may "be required to proceed in the "course of his employment shall "be adequately lighted and in "particulars lights shall be provided at all decks and other "dangerous openings and at all "ladders and gangways."

The real cause of the accident was the existence of a trap, against which no adequate warning was given. Moreover, the obligation to light fell on the "occupier." When a ship was under repair in a public dry dock the person who contracted with the owner of the ship to execute work of repair was to be deemed to be the occupier, but that proviso had no application when there were a number of contractors for doing various jobs on a ship. It contemplated the case when the ship was handed over in a dry dock and passed virtually and substantially into the control of the contractor who took her over. A. & R. Brown, Ld., therefore were not the "occupiers." The shipowners were providing the lights on board the ship within the exception (*c*) to the proviso, but reg. 42 (*b*) only concerned the approaches, and the obligation to light all other parts of the ship when work was being carried on was left to someone else. Here the galley was such a part of the ship, and the obligation to light it did not fall on the shipowners.

Judgment therefore was given against the defendants Rea, Ld., for 349*l*. damages and costs, but as against the other defendants the action was dismissed with costs.

Rea, Ld., appealed against that part of the judgment which affected them, and there was a cross-appeal by the plaintiff asking that these defendants should be ordered to pay to him the amount of the costs payable by him under the judgment to the other two defendants. There was also a separate appeal by the plaintiff asking that judgment for damages and costs should be entered against all the defendants, and not against Rea, Ld., only. The Court of Appeal dismissed the appeal of Rea, Ld., refusing to disturb the learned judge's finding of fact: the plaintiff's appeals alone call for report.

Goldie K.C. and *Melville Kennan* for Rea, Ld.

Hemmerde K.C. and *E. Wooll* for the plaintiff. The defendants A. & R. Brown, Ld., are liable at common law because of their negligence in failing to take proper precautions when the ship was plunged in darkness. If the light was being

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turned off for the purpose of the survey, they should have given warning of it, for it was their duty to prepare that section of the ship for survey, or an alternative system of lighting should have been supplied. The shipowners also are liable at common law for negligence as they employed Rea, Ld., to bring coal to the galley and they should have seen that while the scuttle was open, proper warning was given. They are also liable at common law for failing to insure that the lights were not turned off while the scuttle was open. Again, both A. & R. Brown, Ld., and the shipowners committed a breach of statutory duty. There was a duty under reg. 42 (*a*) to see that all parts of the ship where work was being done were efficiently lighted. Stable J. held that this duty was satisfied because there was an adequate system of lighting. He confused an adequate system of lighting with the maintenance of adequate lighting. It was a breach of statutory duty not to supply alternative lighting while the survey was going on. By the Shipbuilding Regulations, 1931, the duty of complying with the material regulations while the ship was in public dry dock was imposed on the " occupier " and, as the ship was being repaired, the persons contracting with the owners of the ship for the repairs were to be " deemed to "be the occupiers." A. & R. Brown, Ld., were, therefore, deemed to be the " occupier " and as such were liable for a breach of reg. 42 (*a*). [MacKinnon L.J. Were there other firms carrying out repairs in the ship ?] Yes, but the "occupier" should be given the meaning of the repairer at the particular part of the ship. Further, the shipowners were responsible for a breach of reg. 42 (*b*) : see exception (*c*) under " Duties." Reg. 42 (*b*) provides for the adequate lighting of all approaches to places to which a person may be required to proceed in the course of his employment and in particular for the lighting of dangerous openings. The shipowners committed a statutory breach of this regulation, for the places to which a workman is " required to proceed " includes a place where a workman goes to get his tools : *Henaghan* v. *Rederiet Forangirene* (1). *Smith* v. *Cammell, Laird & Co.* (2) really has no application here,

(1) [1936] 2 All E. R. 1426.

(2) [1940] A. C. 242.

because in that case the ship was not in dry dock, but that case makes it clear that the Shipbuilding Regulations impose absolute duties. *Daniel* v. *Rickett, Cockerell & Co. & Raymond* (1), though very different from the present case, shows there may be liability on more than one person.

F. A. Sellers K.C. and *R. S. Nicklin*, for A. & R. Brown, Ld., were not called on to argue.

Clothier K.C. and *Scholefield Allen* for the shipowners. The learned judge was right when he held that the cause of the accident was not any defect in the lighting for which the shipowners are responsible, but the supervening act of Rea, Ld. It was the duty of the servant of Rea, Ld., who was posted at the hatch in the galley to see that no accident happened and his failure to do so was novus actus interveniens. [LUXMOORE L.J. Is it contended that *Daniel* v. *Rickett, Cockerell & Co. & Raymond* (1) was wrongly decided ?] No. There the opening in a coal hole was made in the highway when a far higher duty existed on the owner of the house to which the coal cellar belonged, who could be treated as guilty of a nuisance on the highway if the cover of the coal cellar had been removed by those delivering coal. In any case, the shipowners are not concerned to say that the case was rightly decided. They had employed a reputable firm to deliver the coal and they were under no duty to superintend the work. At the highest the shipowners' only obligation was to keep the lights in good order and they could not know when A. & R. Brown, Ld., and the surveyor were going to switch them off. As regards the alleged breach of statutory duty, this case is very different from *Smith* v. *Cammell, Laird & Co.* (2) where Cammell, Laird & Co. had erected scaffolding and allowed repairers to use it after it had been made defective. There they were liable as occupiers of the repairing yard, which is a factory within the Factory Acts. The Court refused to hold that Cork Insulation Co. were occupiers of part of it. Here the position is different as the Shipbuilding Regulations lay down that when a ship is being repaired the repairers are deemed to be the occupiers. Therefore the electricity repairers were liable under reg. 42 (*a*) to

(1) [1938] 2 K. B. 322.

(2) [1940] A. C. 242.

keep all parts of the ship where work was being carried out efficiently lighted, while the shipowners were liable to comply with reg. 42 (*b*). Their obligation, however, was limited to approaches to places to which a person employed may be required to proceed. It would be very strong to say that a workman passing through a galley when work was being carried out was using an approach. In truth the galley is not an approach to a place "to which a person employed may be "required to proceed in the course of his employment" within reg. 42 (*b*). Further the owners had not undertaken to provide light in the circumstances which existed at the time of the accident, so that exception (*c*) would not impose a liability under reg. 42 (*b*) in those circumstances.

Hemmerde K.C. replied.

Cur. adv. vult.

1941. April 8. The following judgments were read.

SCOTT L.J. [after stating the facts and dealing with the appeal of Rea, Ld. :] The case against the defendants A. & R. Brown, Ld., and Lamport & Holt, Ld., was primarily for breach of statutory duties under the Factory Act, 1937, but with alternative claims for negligence at common law. The only case in fact urged in respect of the former was that those defendants, or one or other of them, had broken certain lighting regulations—regs. 42 (*a*) and 42 (*b*) of the Shipbuilding Regulations, 1931, made by the Secretary of State under s. 79 of the Factories Act, 1901, and continued under s. 159, sub-s. 1, of the Factories Act, 1937, and thereby given the statutory force of s. 60 of that Act. The phrase " public dry dock " is there defined as meaning " any dry dock which is available for hire." The Bidston dock was admittedly such a dock. Under the head of "Duties" it is there provided as follows : [His Lordship read the provision and regs. 42 (*a*) and (*b*).] It was said on behalf of the plaintiff that A. & R. Brown, Ld., were contractors for works of repair and therefore the occupiers within the provision about "Duties" upon whom the duty of lighting under reg. 42 (*a*) was cast. It was also said that, by reason of the exception in the provision under the head of "Duties," Lamport & Holt, Ld., were the occupiers and responsible under reg. 42 (*b*). The learned judge expressed the view about both these defendants that it was "really unnecessary to consider their liability except for "the purpose of considering the question of costs," but he did in fact discuss it and pronounce on it. He held that on whomever the lighting duty was imposed the duty was performed, and he ordered the plaintiff to pay the costs of both defendants whom he had charged with breach of statutory duty. When the plaintiff's counsel asked that the burden of the two sets of costs should be borne by Rea, Ld., he refused, holding that the plaintiff had acted unreasonably in making the contractors and the shipowners defendants to the action. The ground of his decision was that the lighting system supplied by the shipowners was satisfactory and that a purely temporary interruption of the current did not constitute a breach of duty under reg. 42 (*b*). He exonerated A. & R. Brown, Ld., under reg. 42 (*a*) because that company could not be "deemed to be the occupier" since it was not "a person "who had contracted to repair the ship," for it had only contracted to repair parts of the ship. He further held that the cessation of the lighting was not the cause of the accident, but only a condition precedent to the negligence of Rea, Ld., which was the sole cause of the accident. This decision was one of fact, but I disagree with it.

On the plaintiff's claims against both these defendants on the ground of common law negligence the learned judge held that the plaintiff had not established his case against either. With his decision as regards Brown & Co. I agree, but the case against Lamport & Holt cannot be so disposed of. It will, however, be easier to discuss it after considering the issues of statutory liability. The only real case on that head made at the trial and before us was of breaches of regs. 42 (*a*) and 42 (*b*). The shipowners, Lamport & Holt, Ld., were in fact providing the lighting on board the ship and undoubtedly had expressly or impliedly undertaken with A. & R. Brown, Ld., their contractors for repairs, to make that provision, so as to bring them within exception (*c*) of the proviso about "Duties," and that undertaking must clearly have meant that the lighting would be continuous throughout the daily period of the contractors' work. Reg. 42 (*b*) imposed on the shipowners the duty of lighting all places to which an employee of the contractor might be required to proceed in the course of his employment. On the evidence the galley was a place to which the plaintiff was "required to proceed," and the cessation of light was a part cause of the accident. The only question, therefore, is whether the shipowners were entitled to turn off the current at that place without warning and without providing other light. If the duty was absolute, switching off the section was, in the circumstances proved in evidence, a breach. It was obviously their duty to have the illumination on at all material times, and, as the facts of the case show, it was potentially most dangerous suddenly to shut off the lights without warning. It made the means of access to the galley unsafe within reg. 1, which says: "Safe "means of access shall be provided to all parts of the ship to "which persons employed may be required to proceed in the "course of their employment." It rendered futile reg. 10, which says: "All openings in decks and tank tops shall be "securely protected. Such protection shall be maintained "in position and when necessarily removed in the course of "work shall be replaced as soon as practicable." In my opinion, reg. 42 (*b*) is plainly absolute. The principles of construction which lead to such an interpretation were explained very clearly by Lord Atkin in *Smith* v. *Cammell, Laird & Co.* (1) and they apply to reg. 42 (*b*). The cross-appeal on statutory liability must, therefore, be allowed against Lamport & Holt, Ld., and judgment entered for the plaintiff against them with costs here and below.

The cross-appeal against A. & R. Brown, Ld., stands on a different footing. That company was clearly not the "occupier" of the "factory" for the purpose of reg. 42 (*b*), but it is necessary to consider reg. 42 (*a*) which apparently does not apply to the shipowner. It is not necessary to discuss the view of the learned judge that a repairs contractor is not

(1) [1940] A. C. 242, 258, 259.

to be deemed the occupier unless he is contractor for the whole ship, nor the question whether, if he is the contractor for a defined part or place of or in the ship, he may not come under the duties of an occupier of that part or place, nor whether there can in any circumstances be two or more occupiers of the same part or place. A. & R. Brown, Ld., were in fact the only "contractors" doing repairs in the galley, and what they were doing there was a trivial and localized job for which the plumber's candle afforded sufficient light. It would obviously be absurd to treat such contractors as responsible for any general lighting which was ex hypothesi all being done by the shipowners. That company, therefore, was rightly entitled to judgment on the issue of reg. 42 (*a*).

There can, in my opinion, be no doubt that the main responsibility for the accident to the plaintiff rests on Rea, Ld. Until the extinguishment of the light there was no danger, for anybody entering a ship under repair in a graving dock preparatory to an outward voyage knows that there may be many dangers lurking in his path, which, with the ordinary care of a person conversant with what is to be expected, can easily be avoided. But when the lights went out there was, and the foreman at once realized there was, a sudden danger which the near sound of steps coming along the starboard alley made imminent. From the points of view both of cause and of blame the failure of the foreman to prevent the plaintiff from entering the galley in those circumstances constituted the main act of negligence for which Rea, Ld., were held liable. Nevertheless, the shipowners had failed in their duty of adequate lighting and brought about the state of danger which was a part cause of the accident. Can it be said that they owed no duty at common law to persons in the position of the plaintiff who, they ought to have known, might be "required" to pass through the galley? I do not think they can be exonerated altogether. They must bear some part of the blame because they allowed the temporary switching off of lights, when ordered by the surveyor to Lloyd's Register, without any arrangement for warning, when they knew that to do so might cause danger to someone, although in point of degree their negligence was, in my opinion, much less than that of Rea, Ld.

On the appeal it remains to deal with the learned judge's refusal to put the burden of A. & R. Brown, Ld.'s, costs, which he had ordered the plaintiff to pay, on to the back of Rea, Ld. I think he was right, and that there was no more shadow of justification for joining A. & R. Brown, Ld., as defendants on the ground of common law negligence than on the ground of breach of statutory duty. In the result, I think that the plaintiff's counsel ought to have read the regulations more carefully and realized that it would be unreasonable to make that company defendants on either cause of action. I have expressed this opinion about costs on the hypothesis that that question was open to the plaintiff on his cross-appeal in the absence of leave to appeal, but it must not be assumed that the hypothesis has any justification.

In the result, the appeal of Rea, Ld., is dismissed with costs. The cross-appeal of the plaintiff is allowed against Lamport & Holt, Ld., with costs here and below, but it is dismissed with costs as against A. & R. Brown, Ld. We make no order for payment by either of the unsuccessful defendants of the costs payable by the plaintiff to A. & R. Brown, Ld.

MacKinnon L.J. I have had the pleasure of reading the judgments written by Scott L.J. and Luxmoore L.J. in this case. I content myself with saying that I agree with their reasons and with the order they enunciate.

Luxmoore L.J. [after stating the facts and dealing with the appeal of Rea, Ld., and holding that it must be dismissed, with costs:] It will, I think, be convenient to deal with the plaintiff's appeal against the order dismissing his action against A. & R. Brown, Ld., and the shipowners before dealing with his cross-appeal with regard to A. & R. Brown, Ld., and the owners' costs. The plaintiff seeks to make A. & R. Brown, Ld., and the owners liable on the ground that each of them was under a statutory duty to him and also on the ground that each of them was guilty of negligence at common law.

I will first deal with the claim against A. & R. Brown, Ld. At the time the accident happened two of their workmen were engaged on a small repairing job in the galley. This had no relation whatever to the coaling operations and I am quite unable to understand how in any circumstances A. & R. Brown, Ld., can have been guilty of any negligence towards the plaintiff at common law. The next question is whether A. & R. Brown, Ld., were under any statutory duty towards the plaintiff. The case against A. & R. Brown, Ld., on this head is based on the Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901, in respect of the construction and repair of ships in shipbuilding yards. (St. R. & O., 1931, No. 133.) These regulations were at the time of the accident and still are in force under the provisions of s. 159 of the Factory Act, 1937. Shipbuilding yards are defined in the Factory and Workshop Act, 1901, Sch. VI., Part II., para. 25, as "Any premises in which any "ships, boats or vessels used in navigation are made, finished "or repaired." Presumably this definition is still applicable to the order although the Factory and Workshop Act, 1901, has been repealed by the Factory Act, 1937. The order provides that it shall be the duty of the occupier to comply with Parts I. to VIII. of these regulations provided that when a ship is being repaired in public dry dock the person who contracts with the owner of the ship or with his agent to execute the work of repair shall be deemed to be the occupier for the purposes of Parts I. to VIII. and it shall be his duty to comply with the said Parts with certain exceptions. It is unnecessary to refer specifically to any of these exceptions or to any of the regulations unless A. & R. Brown, Ld., are, on the true construction of the words which I have quoted from the regulations, to be deemed to be the occupiers. There is no definition of the word "occupier" in the regulations or the Act, nor is there to be found in the regulations any express statement of what it is the occupier is to be deemed to be in occupation of. The solution of the difficulty is to be found in *Smith* v. *Cammell, Laird & Co.* (1), where Lord Atkin said (2):

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(1) [1940] A. C. 242.

(2) Ibid. 256.

"It appears to me that if one seeks to inquire into the meaning "of the word 'occupier' in the sentence stating that it is "the duty of the occupier to comply with Parts I. to VIII. "by asking, occupier of what, the only answer can be occupier "of that which alone has been previously mentioned in the "Regulations as capable of being occupied, namely, the "shipbuilding yard which is the factory within which "the Regulations are to operate. It is not the occupier of the "'staging or that part of the ship' . . . . 'such part of the "'ship as was necessary for the work which the Cork "'Insulation Co., had to do' . . . . 'the place where the "'accident occurred,' 'the locus where the staging stood' ". . . . Nor is the 'occupier' the right word to describe "the person controlling the work in doing which the accident "happened, or the person using the machinery which gives "rise to an accident." In *Smith* v. *Cammell, Laird & Co.* (1) the person held to be the occupier was the builder of a ship in a shipbuilding yard and was not a person deemed to be the occupier because he had agreed with the owner to repair a ship in a public dry dock. In the present case A. & R. Brown, Ld., had not agreed with the owners to repair the motor vessel *Linnell*, in the Bidston dry dock. They had only agreed to do certain parts of the repair work which was being carried out on the ship while in that dock. It is, therefore, impossible, in my judgment, to hold that A. & R. Brown, Ld., were to be deemed to be the occupiers of the dry dock at the time the accident occurred, and they cannot, therefore, have been under any statutory duty to the plaintiff. It follows that, in my judgment, Stable J. was right in dismissing the action against A. & R. Brown, Ld.

With regard to the action against the owners it will be convenient to consider first whether they were under any statutory duty towards the plaintiff under the regulations. The regulations do not contemplate that the owners could be "occupiers" under the words "It shall be the duty of the "occupier to comply with Parts I. to VIII. of these Regulations," for it has been held in *Smith* v. *Cammell, Laird & Co.* (1) that,

(1) [1940] A. C. 242.

on the true construction of the regulations, the subject-matter of the occupation is a shipbuilding yard. By the definition already referred to, a shipbuilding yard includes a dry dock where repairs are being done. It was not, however, argued that the owners were liable as occupiers of the dry dock. It was contended that they were liable under the express words of reg. 42 (*b*). [His Lordship read the regulation.] The duty under this regulation is imposed on the owners by sub-clause (*c*) of the proviso to the clauses contained in that part of the regulations included under the heading "Duties." Sub-clause (*c*) is in these words: "Where the shipowner provides the lighting "on board the ship it shall be the duty of the shipowner . . . . "to comply with reg. 42 (*b*) so far as regards the lighting of "the ship which he has undertaken to provide." In the present case the owners admittedly provided the lighting on board the vessel. The question then arises: Is the duty imposed absolute, or is it to be construed as limited to a duty to take reasonable care to keep the parts specifically mentioned light? I can see no reason for not giving the words of the reg. 42 (*b*) their ordinary meaning. The words are peremptory. The particular approaches mentioned "shall "be adequately lighted." That must necessarily be at all times when they are being, or may be, used. On this construction there can be no doubt but that the owners' duty to light is absolute. The switching off of the light and its consequent extinguishment at the time when the accident occurred left an approach to a place, to which Wilkinson was required to proceed in the course of his employment, not adequately lighted, and consequently there was a breach of the owners' statutory duty, and for this breach of duty they are liable.

This is sufficient to dispose of the appeal against the owners, but, as the matter was argued, I think it right to decide the question whether the owners were also under any common law liability. The first material fact to be borne in mind is that the owners were at all material times in control and occupation of the ship having in the floor of the galley a hatch with a cover which would, if it was removed, constitute an unusual

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danger. The duty of an occupier in such circumstances towards a person who, like the plaintiff, was in the vessel engaged on lawful business in the course of fulfilling a contract between A. & R. Brown, Ld., his employers, and the owners is that, if the person uses reasonable care for his own safety, he is entitled to expect that the owners shall on their part use reasonable care to prevent damage from unusual danger which they know or ought to know: see *Indermaur* v. *Dames* (1), especially the remarks of Willes J. It is not suggested that the owners gave the plaintiff any warning of the danger or took any special steps to guard against it. The question, therefore, whether the owners took reasonable care for Wilkinson's safety and whether the plaintiff was guilty of contributory negligence are matters of fact to be determined by the judge as he was sitting without a jury. There could be no question but that the owners would have been liable in the present case if they had themselves been carrying out the work of delivering coal through the uncovered hatch into the bunker below without warning the plaintiff of the danger. They seek, however, to avoid liability on the ground that the coal merchants were independent contractors whom they reasonably believed to be competent to carry out their work properly. The late Sir Frederick Pollock wrote in his work on Torts (see 14th ed., p. 409): "I can see no reason for thinking "that the duty declared in *Indermaur* v. *Dames* (1) can be "escaped by delegating its performance to an independent "contractor. It is not stated in the terms which Willes J. "would have used if he had meant to add this to the limitations "he so carefully laid down." In *Daniel* v. *Rickett, Cockerell & Co. & Raymond* (2), Hilbery J. held the occupier to be liable for injury suffered by the plaintiff through an opening in the pavement opposite the occupier's house caused by the lifting of a cellar flap for the purpose of delivering coals into the occupier's cellar, and in so doing the learned judge followed the decision in *Pickard* v. *Smith* (3) where Williams J. (who delivered the judgment of the Court of Common Pleas) said (4):

(1) (1866) L. R. 1 C. P. 274, 288.
(2) [1938] 2 K. B. 322.
(3) (1861) 10 C. B. (N. S.) 470.
(4) Ibid. 480.

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"The defendant (that is the occupier) is not absolved by the "fact of the coal-merchant being employed, and of the injury "being the consequence of his immediate act. Unquestionably, "no one can be made liable for an act or breach of duty, "unless it is traceable to himself or his servant or servants "in the course of his or their employment. Consequently if "an independent contractor is employed to do a lawful act, "and in the course of the work he or his servants commit "some casual act of wrong or negligence, the employer is not "answerable. To this effect are many authorities which were "referred to in the argument. That rule is, however, "inapplicable to cases in which the act which occasions the "injury is one which the contractor was employed to do; "nor, by a parity of reasoning, to cases in which the contractor "is intrusted with the performance of a duty incumbent upon "his employer, and neglects its fulfilment, whereby an injury "is occasioned. Now, in the present case, the defendant "employed the coal-merchant to open the trap in order to "put in the coals; and he trusted him to guard it whilst "open, and to close it when the coals were all put in. The "act of opening it was the act of the employer, though done "through the agency of the coal-merchant; and the defendant, "having thereby caused danger, was bound to take reasonable "means to prevent mischief. The performance of this duty "he omitted; and the fact of his having intrusted it to a "person who also neglected it, furnishes no excuse, either in "good sense or law." It seems to me that this passage applies to the present case. The owners employed the coal merchants to open the hatch cover so that the coals to be supplied might be delivered into the bunker. The removal of this cover caused danger and the owners were bound of take reasonable means to prevent mischief. The owners themselves did nothing. The coal merchants did not do sufficient and, therefore, the owners remain liable as well as the coal merchants.

The plaintiff has succeeded in establishing the liability of the owners as well as that of the coal merchants and he is entitled to a judgment for the 349*l.* against each. No question of indemnity or contribution as between the owners and the coal merchants is raised in the pleadings and there are no third party proceedings. Although it may well be that the owners are entitled to some relief as against the coal merchants under the provisions of the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, s. 6, that is a matter which cannot, except by agreement, be dealt with on this appeal. It follows from what I have said that the plaintiff's appeal succeeds as against the owners and the order of Stable J. should be varied by making the owners liable with the coal merchants for the payment to the plaintiff of the 349*l.* and the costs of the action. There should be omitted from the order the direction that the plaintiff should pay the costs of the owners.

The only matter which remains to be dealt with is the plaintiff's cross-appeal with regard to the order directing him to pay the costs of A. & R. Brown, Ld., and the owners. This appeal is solely concerned with costs which by law are left to the discretion of the Court. No leave to appeal was obtained from the judge and the appeal is, therefore, incompetent: see Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (*h*).

In the result, I think the appeal of the coal merchants should be dismissed with costs. The appeal of the plaintiff against the order of the Court below, so far as it relates to the question of liability of A. & R. Brown, Ld., and the owners should be dismissed with costs so far as A. & R. Brown, Ld., are concerned and should be allowed against the owners. The plaintiff must pay A. & R. Brown's costs of this appeal, while the owners must pay the plaintiff's costs of his appeal so far as they are not increased by the adding of A. & R. Brown, Ld., as respondents thereto. The plaintiff must pay the costs of A. & R. Brown, Ld., and the owners of the cross-appeal. The order should provide for the usual set off.

Cross-appeal as against the shipowners allowed;
and as against A. & R. Brown, Ld., dismissed.

Subsequently, at the request of the parties, the Court decided that the coal merchants should pay three-fourths and the shipowners one-fourth of the damages and costs, other than A. & R. Brown, Ld.'s costs.

Solicitors for Rea, Ld.: *Gregory, Rowcliffe & Co., for Barrell, Son & Co., Liverpool.*

Solicitors for Lamport & Holt, Ld.: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for A. & R. Brown, Ld.: *Carpenter & Co., for Laces & Co., Liverpool.*

Solicitors for the plaintiff: *Helder, Roberts, Giles & Co., for John A. Behn, Twyford & Reece, Liverpool.*

H. C. G.

Overruled. VESTEY'S EXECUTORS *v.* I.R.C. [1949] 1 All E.R. 1108.

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COMMISSIONERS OF INLAND REVENUE *v.* GAUNT.

K. B. D.
1941
Mar. 18, 19;
April 8.
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June 27.

Revenue—Income tax—Sur-tax—Settlement—Interest of settlor—Income applicable for benefit of settlor or his wife—Rule against perpetuities—Resultant trust—" Wife "—Non-inclusion of widow—Finance Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 38, *sub-ss.* 3, 4.

By s. 38, sub-s. 3, of the Finance Act, 1938, it is provided that: " If and so long as the settlor has an interest in any income arising " under or property comprised in a settlement, any income so " arising during the life of the settlor in any year of assessment shall, " to the extent to which it is not distributed, be treated for all " the purposes of the Income Tax Acts as the income of the settlor " for that year, and not as the income of any other person."

Sub-s. 4 provides: " For the purpose of the last foregoing " subsection the settlor shall be deemed to have an interest in " income arising under or property comprised in a settlement, " if any income or property which may at any time arise under " or be comprised in that settlement is, or will or may become, " payable to or applicable for the benefit of the settlor or the wife " or husband of the settlor in any circumstances whatsoever."

By the terms of a settlement the settlor directed the trustees to accumulate and invest the income of the trust fund during his life-time. By clause 2 (*b*) the trustees were to hold the trust fund from and after the death of the settlor, subject to such trusts and with and subject to such powers and conditions as he might by will or codicil declare. By clause 3 it was declared that neither the settlor nor any wife of his should benefit from the trust during his life-time. Clause 7 empowered the settlor, subject to the consent of certain persons, to appoint new trusts, provided that that power should not be exercised in his favour or in the favour of any wife of his:—

Held, by Lawrence J. (the Court of Appeal expressing no opinion on these points), that clause 7 would enable the settlor to secure such a benefit for himself, by, for instance, appointing a new trust of a discretionary nature, with himself as one of the cestuis que trust, as brought the settlement within the terms of s. 38, sub-s. 4, of the Act of 1938, but that, even if the settlement did offend against the rule against perpetuities, the resulting trust to the settlor's estate was not an interest of the settlor within the meaning of s. 38, sub-ss. 3, 4.

Held, by the Court of Appeal, reversing the decision of Lawrence J. on this point, that the word " wife " in sub-s. 4 includes a " widow."

Decision of Lawrence J. in favour of the Crown affirmed on another ground.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the commissioners held on April 12, 1940, the respondent, G. R. Gaunt, appealed against two assessments to sur-tax in the sums of 8446*l.* and 21,554*l.* made on him for the years ending April 5, 1938, and April 5, 1939, under the provisions of the Income Tax Acts.

The appeal raised the point whether the actual income of a company called the Bias Bay Investment Company, Ld., which had been apportioned to certain trustees under s. 21 of the Finance Act, 1922, should be treated as the respondent's income for the purposes of sur-tax for the years in question, by reason of the provisions of s. 38 of the Finance Act, 1938.

The respondent, by a settlement made on March 10, 1938, between himself and certain trustees, settled 100*l.* on the trustees, who were directed to invest 98*l.* thereof in purchasing ninety-eight deferred shares of 1*l.* each in the company. Clause 2 (*a*) of the settlement directed the trustees to accumulate and invest the income of the trust fund during the lifetime of the respondent. By clause 2 (*b*) the trustees were to hold the trust fund from and after the death of the respondent, subject to such trusts and with and subject to such powers and conditions as he might by will or codicil declare. Clause 3 declared that neither he nor any wife of his should benefit from the trust during his lifetime. Clause 7 declared that he might appoint new trusts subject to the consent of certain persons, provided that this power should not be exercisable in his favour or in the favour of any wife of his. Directions under s. 21 of the Finance Act, 1922 [super-tax on undistributed income of certain companies] were made on the company for the years 1937–38 and 1938–39, and of its actual income for those years 13,473*l.* 17*s.* 9*d.* for 1937–38 and 14,052*l.* for 1938–39 was apportioned to the trustees of the settlement.

The commissioners held that neither the respondent nor his wife would receive any benefit under the settlement; that the word "wife" did not include "widow"; and that the settlement did not come within the provisions of s. 38 of the Finance Act, 1938, and discharged the assessments.

The Crown appealed.

Sir Wm. Jowitt S.-G., J. H. Stamp and *R. P. Hills* for the appellants.

Frederick Grant for the respondent.

Cur. adv. vult.

1941. Apr. 8. LAWRENCE J. read the following judgment: Three main questions arise in this case on the construction of a settlement made by the respondent on March 10, 1938, and of s. 38 of the Finance Act, 1938. First, does the power conferred on the settlor by clause 7 of the settlement bring the income of the trust fund within s. 38, sub-ss. 3 and 4, of the Act? Secondly, does the power of the settlor, either under clause 2 or clause 7, by will to benefit his wife after his death, bring the income of the trust fund within s. 38? Thirdly, do the provisions of clause 2 offend against the rule against perpetuities, and thereby or otherwise create a resulting trust to the settlor?

On the first question it was contended on behalf of the Crown that clause 7 empowers the settlor to appoint new trusts which, although not drawn expressly in his favour or in his wife's favour, are intended solely to benefit him, and that such a power implies that the income of the trust fund may in certain circumstances become applicable for the benefit of the settlor or his wife within the meaning of s. 38, sub-s. 4. For the respondent it was contended that clause 7 does not empower the settlor to appoint a new trust which in any way benefits him or his wife, and that the provision as to consent was introduced solely to satisfy the minds of the persons asked to consent, and that if that provision conflicts with the previous provision against exercising the power in favour of the settlor, it must be disregarded. On the second question it was contended for the Crown that s. 38, sub-s. 4, has regard to the person who is the settlor's wife at the time of the settlement, and that, if the settlement confers any benefit on that person, whether she be wife or widow when the benefit is to be enjoyed, the settlement is within the section. For the respondent it was contended that the word "wife" means "wife" and not "widow," and that, if the benefit of the settlement cannot be enjoyed until after she has ceased to be the settlor's wife, the settlement is not within the section. On the third question it was contended for the Crown that, since by clause 2 (*b*), the trustees were to hold the trust fund after the death of the settlor on such trusts as the settlor might by will declare concerning his residuary estate, the settlement might offend against the rule against perpetuities, in which case there would be a resulting trust to the settlor which would be an interest within the meaning of s. 38, sub-s. 4, and that, even apart from the rule against perpetuities, the settlor had an immediate interest in the trust fund from the date of the settlement by reason of his power to declare by will trusts which would enable his estate to enjoy the trust fund at his death. It was argued that clause 2 (*b*) did not confer a general power of appointment on the settlor, in which case the rule against perpetuities would begin to run from the exercise of the power, because he had no power thereunder to make the property his own and could not alter the provisions of clause 2 (*b*), and that, therefore, it was a referential trust under which the rule ran from the date of the settlement. For the respondent it was contended that clause 2 (*b*) did confer a general power of appointment, but that, even if it did not, the resulting trust, if any, could not be to the settlor in his lifetime, but to his estate after his death, and, therefore, did not bring the settlement within s. 38. The respondent relied in this connection on *Bristow* v. *Skirrow* (1).

On the first point I am of opinion that the terms of clause 7 do bring the present settlement within s. 38. I think that on the true construction of the words " in favour of the settlor," when contrasted with the words which follow, the settlor had power to secure for himself such a benefit as would bring the settlement within s. 38, for instance, if he appointed a new trust of a discretionary nature with himself as one of the cestuis que trust. In my view, such a construction gives a meaning to all parts of the clause, and ought, therefore, to be adopted rather than one which necessitates the rejection of the last part of the clause, nor am I able to give the restricted meaning to that part contended for by the respondent.

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(1) (1859) 27 Beav. 585.

On the second point I am of opinion that the object of the section is to prevent the settlor from getting the benefit of the trust fund during his lifetime. It is not to prevent his wife from enjoying the trust fund after his death, and I do not think the word " wife " is apt to describe the settlor's widow. The income must be capable of being paid to, or applicable for the benefit of, the wife, which, in my opinion, means while she is his wife.

On the third point I am of opinion that, even if the settlement does offend against the rule against perpetuities, the resulting trust to the settlor's estate is not an interest of the settlor within the meaning of s. 38, sub-ss. 3 and 4. Under such a resulting trust the income can in no circumstances become payable to the settlor himself, nor has the settlor, in my opinion, such an immediate interest as falls within the section. Even if he can sell the reversion to the trust fund, the proceeds of such a sale are not, in my opinion, " income "arising under or property comprised in the settlement," within sub-s. 4 of s. 38.

The appeal will be allowed, with costs.

Appeal allowed.

A. W. G.

The settlor (respondent in the Court below) appealed. The appeal was heard on June 27, 1941.

On the hearing of the appeal, the Solicitor-General intimated on behalf of the Crown that even if the appeal were successful on the point raised by the appellant, it would nevertheless be contended by the Crown that the decision of Lawrence J. in the court below in favour of the Crown could be supported on the ground that his decision that the word " wife " in s. 38, sub-s. 4, of the Finance Act, 1938, did not include a " widow " was wrong. The appellant's counsel were accordingly requested by the Court to confine their argument in the first instance to supporting the decision of Lawrence J., that the word " wife " in sub-s. 4 of s. 38 did not include " widow."

J. Millard Tucker K.C. and *Frederick Grant* for the appellant. Sect. 38, sub-s. 4, of the Finance Act, 1938, can only apply to a wife in the lifetime of the settlor. Having regard to the obvious purpose of the section and to the fact that a wife's income is always deemed to be the income of her husband, the word " wife " in the section means a person who at the time she receives the benefit is actually the wife of the settlor, and does not include a person who, although she has been the wife of the settlor, at the time she receives the benefit of the settlement, is no longer his wife but has become his widow. The section contemplates that the settlor is alive at the time the income arises.

Sir Wm. Jowitt S.-G., J. H. Stamp and *R. P. Hills* for the Crown were not called on to argue.

Scott L.J. The question raised by this appeal is whether s. 38 of the Finance Act, 1938, brings certain income covered by a settlement by the settlor, Mr. Gerald Raynor Gaunt, within the net of income tax and sur-tax legislation. The short point on which the case really turns is whether, in the language of s. 38, where in relation to certain settlements the wife of the settlor is referred to, the word " wife " includes " widow." If the word " wife " is there to be read as including " widow," that is to say, as applying to the wife after the death of the husband, it is conceded that certain income referred to in the case is subject to the terms of s. 38. In my view it would be wrong to limit the word " wife " as is suggested. In my opinion it is obviously the meaning of the section that the word " wife " should extend to the case of a " widow." That is the sole question in the appeal: but I shall invite Clauson L.J. to add a few words as to the reasons why he thinks that is the right conclusion.

Clauson L.J. I entirely agree with the Lord Justice, but I will add a few words, because we are differing from the learned judge in the court below. I cannot do better than take the point as he states it in his judgment. The point we are dealing with to-day is that which is referred to in the

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learned judge's judgment as the second question, which he states in this way: "Does the power of the settlor, either "under cl. 2 or cl. 7 by will to benefit his wife after his death, "bring the income of the trust fund within s. 38?" He puts it in this way: "On the second question, it was contended "for the Crown that s. 38 has regard to the person who is the "settlor's wife at the time of the settlement, and that if the "settlement confers any benefit on that person, whether "she be wife or widow when the benefit is to be enjoyed, the "settlement is within the section. For the respondent it was "contended that the word 'wife' means 'wife' and not "'widow'; and that if the benefit of the settlement cannot be "enjoyed until after she has ceased to be the settlor's wife, "the settlement is not within the section."

That being the point, and those being the two contentions which were raised in the court below, before reading the learned judge's judgment on the point I should like to make one or two observations. The frame of the section is this. In the case of certain settlements, although under the terms of the settlement the income is no part of the income of the settlor, still if the provisions of the settlement are such as to satisfy one or other of a number of criteria mentioned in the section, then although the income is not the settlor's income—and may never be the settlor's income—in fact, he has nothing to do with it beyond the fact that he is the settlor—as a purely artificial arrangement he has to pay sur-tax as if it was his income. When one comes to the criteria, one sees that the criteria are directed to this. The legislature directs it to be investigated whether there is a possibility that, under the terms of the settlement, or of some settlement which may be substituted for it under some power of revocation, certain people, namely the settlor or his wife, are or may be, ultimately beneficially interested. I will now read what the learned judge says: "On the second point I am of opinion that the "object of the section is to prevent the settlor from getting the "benefit of the trust fund during his lifetime. It is not to "prevent his wife from enjoying the trust fund after his death; "and I do not think the word 'wife' is apt to describe the "settlor's widow. The income must be capable of being "paid to, or applicable for the benefit of, the wife, which, in "my opinion, means while she is his wife."

Far be it from me to criticize meticulously the language of the learned judge, especially when dealing with such an extremely complex matter as this highly artificial series of sections. All of us who have had to deal with matters of that kind are conscious of how easy it is to slip into some inaccuracy of language. But with all respect to the learned judge, I cannot help thinking that the conclusion that he has come to is coloured by the view that he has taken of the effect of the section upon the settlor's interest in the fund. Of course, that is not the point at all. The question is, who are the people whose interests in the fund under the settlement, or under a possible substitution for it under the power of revocation, are of such a character that the legislature thinks that a very remarkable result should ensue as regards taxability of income? When one realizes that that is the point of it, there does not seem to be any sense whatever in making the matter depend upon the possibility of a lady obtaining a benefit in her husband's lifetime. One does not see why the position should be any different because the benefit that she is to get is to be after her husband's death than if it is to be before her husband's death. The husband's death seems to have no relevance. Prima facie, therefore, one would suppose that the word " wife " means that which is its true natural meaning, a lady who, during the latter part of the joint lives of herself and a man, has been the wife of that man. That is the meaning of the word " wife." It is perfectly true that the word " widow " is used to express the position of a lady when her husband has died. In one sense when a woman has become a widow she is no longer a wife. That is perfectly true. But the description in this section of her as a wife refers to the lady, and has nothing to do with the matter of time. It has nothing to do with whether you are talking of her as being a lady who is living at the same time as her husband or as being a lady who survived her husband. Accordingly, the difference, if difference there be for this purpose, between the words " wife " and

" widow " is quite immaterial for the purposes of this section. Why, in those circumstances, when a lady is referred to as the wife of so-and-so, it should be supposed that she ceases to hold the character indicated by that reference the moment her husband dies, I must confess I cannot understand. I should have thought it was perfectly clear that when the section refers to the possibility of the settlor's wife obtaining a benefit, it refers to the possibility of obtaining a benefit either during her husband's lifetime or afterwards, and it would be curious if it meant anything else.

For these reasons I am quite unable to accept the view of the learned judge on this point. It appears to me that on this part of the case the judgment of the learned judge is wrong, and that he should have decided the point the other way. The nett result of that will be, as I understand it, that his judgment will be supported, because he decided in favour of the Crown, though on another point which, in the view we take of this point, it is not necessary for us to deal with. I think that has put the position correctly.

Goddard L.J. I agree. What we have to consider is whether the property comprised in this settlement may become payable to, or be applicable to the benefit of, the wife of the settlor in any circumstances whatsoever. One of the circumstances in which it may become payable or applicable to the wife is on the death of her husband. It seems to me clear that the word " wife " in this case includes " widow." I agree with the judgment which has just been delivered by Clauson L.J.

Appeal dismissed.

Solicitor for the Crown : *Solicitor of Inland Revenue.*

Solicitors for the respondent in the court below, the appellant in the Court of Appeal : *Ashurst, Morris Crisp & Co.*

R. F. S.

COCKER *v.* SHEFFIELD CORPORATION.

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1941

April 1, 8.

Workmen's compensation—Assessment—Average weekly earnings—Increase of wages—New grade of employment—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 2 (*i.*); *s.* 10, *rr.* (*i.*), (*iii.*).

On September 21, 1938, the appellant entered the employment of the respondents as a non-resident nurse-attendant without previous experience. Her wages, including uniform allowance, were 40*s.* 5*d.* a week. In September, 1939, the respondents adopted a report of their public assistance and health committees with regard to salaries, wages and conditions of service of the council's officials and staff. That report, which classified the council's employees in various categories, recommended that the remuneration of non-resident nurse-attendants should be increased to the following scale (inclusive of uniform allowance): Without experience, 44*s.* 4*d.*; with one year's experience, 46*s.* 3*d.*; with two years' experience, 48*s.* 2*d.* The appellant was paid 44*s.* 4*d.* for the week ending September 14, 1939; 45*s.* 11*d.* for the week ending September 21, 1939 (in which she completed one year's service); and thereafter 46*s.* 3*d.* a week. On December 9, 1939, she met with an accident arising out of and in the course of her employment and was totally incapacitated for eight weeks. The respondents paid her compensation at the rate of 23*s.* a week, this figure being based on her average weekly earnings for the previous twelve months. She demanded an arbitration, claiming that the correct rate was 24*s.* 1*d.*, based on a weekly wage of 46*s.* 3*d.* She contended that when she completed one year's service and became entitled to the higher rate of wages, she entered a new grade in the employment of the respondents, and that the calculation of compensation by reference to the twelve months' average had, therefore, become "impracticable" within the meaning of s. 10, r. (i.), of the Workmen's Compensation Act, 1925:—

Held (by Scott and Luxmoore L.JJ., MacKinnon L.J. dissenting), that each wage category of non-resident nurse-attendants was a separate grade, so that the appellant was entitled to have her compensation based on a weekly wage of 46*s.* 3*d.*

The opening sentence of r. (i.) of s. 10 of the Workmen's Compensation Act, 1925, is not an overriding provision requiring the court to reject the twelve months' average if it thinks it works unfairly. The "average weekly earnings" referred to are the same as the "average weekly earnings during the previous twelve "months" referred to in s. 9.

APPEAL from His Honour Judge Essenhigh at Sheffield County Court.

The following statement of facts is taken from the written judgment of LUXMOORE L.J. On September 21, 1938, the appellant entered the service of the Sheffield Corporation as a non-resident nurse-attendant at its institution carried on at Fir Vale House. At that time the corporation paid non-resident nurse-attendants on the scale set out in a document which was in evidence before the county court judge and was intituled "The Report and Recommendations "regarding Salaries, Wages and Conditions of Service as "adopted by the Public Assistance and Health Committees on "August 28 and 29, 1939, respectively." This scale shows that a non-resident nurse-attendant, if without experience, was at the date of the report paid 38*s*. 6*d*. a week; that such a nurse with one year's experience was paid a weekly wage of 40*s*. 5*d*.; with two years' experience a weekly wage of 42*s*. 4*d*.; and, with three years' experience, a weekly wage of 44*s*. 3*d*. In each case a uniform allowance was to be paid in addition to the fixed weekly wage. The report recommended that these weekly wages should be increased, in the case of a non-resident nurse-assistant without experience, to 42*s*. 4*d*. a week; with one year's experience, to 44*s*. 3*d*. a week; and, with two years' experience, to 46*s*. 2*d*. a week. In each case there was a fixed weekly allowance for uniform. The new scale of wages came into force in September, 1939, and for the week ending September 14, 1939, the appellant received as her wages for that week 42*s*. 4*d*., plus 2*s*. for uniform allowance, instead of 38*s*. 6*d*. and 1*s*. 11*d*. uniform allowance received for the previous week. Her one year's employment ended on September 20, and on September 21, 1939, she became a non-resident nurse-assistant with one year's experience, and, accordingly, for the week ending September 21, 1939, she received, apart from her uniform allowance, 43*s*. 11*d*., which was the proper amount for that week if the week's salary was apportioned between the two rates, namely, five days at 42*s*. 4*d*. a week and one day at 44*s*. 3*d*. a week. After September 21, 1939, the appellant received the full weekly salary of 44*s*. 3*d*. and 2*s*. uniform allowance payable under the new scale to a non-resident nurse-assistant with one year's experience down to the week ending December 14, 1939.

On December 9, 1939, the appellant injured her ankle owing to an accident which admittedly arose out of and in the course of her employment. The injury caused total incapacity for work until February 3, 1940, a period of eight weeks. The corporation paid the appellant 1*l*. 3*s*. a week during the whole period of incapacity, this sum being based on an average weekly wage of 41*s*. 11*d*. during the twelve months preceding the date of the accident. The appellant instituted the appropriate arbitration proceedings under the Workmen's Compensation Act, 1925 (1), on May 22, 1940, because she claimed that her compensation should be fixed at 1*l*. 4*s*. 1*d*., which is admittedly the appropriate amount payable to her if compensation is to be calculated on the basis of an average weekly wage of 44*s*. 3*d*. plus 2*s*. uniform allowance. It was contended before the county court judge that the appellant, having completed the first year of her employment on September 20, 1939, entered on a different

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(1) The Workmen's Compensation Act, 1925, s. 9, sub-s. 2: "The rules for calculating the "weekly payment in the case of "total incapacity shall be—(i.) The "weekly payment shall . . . . "be a sum not exceeding fifty "per cent. of the workman's "average weekly earnings during "the previous twelve months, if "he has been so long employed "by the same employer, but if not, "then for any less period during "which he has been in the employ-"ment of the same employer."

Sect. 10: "For the purposes of "the provisions of this Act relating "to 'earnings' and 'average "'weekly earnings' of a work-"man, the following rules shall be "observed:—(i.) Average weekly "earnings shall be computed in "such manner as is best calculated "to give the rate per week at "which the workman was being "remunerated: Provided that "where by reason of the shortness "of the time during which the "workman has been in the employ-"ment of his employer or the "casual nature of the employment, "or the terms of the employment, "it is impracticable at the date of "the accident to compute the "rate of remuneration, regard may "be had to the average weekly "amount which, during the twelve "months previous to the accident, "was being earned by a person in "the same grade employed at the "same work by the same employer, "or, if there is no person so "employed, by a person in the "same grade employed in the "same class of employment and in "the same district . . . .; (iii.) Em-"ployment by the same employer "shall be taken to mean employ-"ment by the same employer in "the grade in which the workman "was employed at the time of the "accident, uninterrupted by ab-"sence from work due to illness or "any other unavoidable cause."

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grade of employment and on September 21, 1939, became a non-resident nurse-assistant with one year's experience, so that her compensation ought to be fixed on the weekly average of her earnings from September 20, 1939, to the date of the accident, namely, 46*s.* 3*d.* The county court judge held that there was no change of grade of employment on September 21, 1939, "as laid down by the cases," and he, accordingly, dismissed the appellant's application and made an award in favour of the corporation, with costs. The appellant appealed asking that the decision and award of the county court judge might be set aside and that an award be made in her favour for the payment of 1*l.* 4*s.* 1*d.* a week during incapacity, credit being given for the amounts already received by her.

F. A. Sellers K.C. and *Edgedale* for the appellant. The basis of compensation is to be arrived at from ss. 9 and 10 of the Act read together. The prima facie rule laid down by s. 9 that the basis is to be "the workman's average weekly earnings during "the previous twelve months, if he has been so long employed "by the same employer" has to be linked up with r. (iii.) of s. 10, which defines "employment by the same employer" as employment by him "in the grade in which the workman "was employed at the time of the accident." It is submitted that there was a change of grade when the appellant passed on September 21, 1939, from the category of "non-resident "nurse-attendant without experience" to that of "non-"resident nurse-attendant with one year's experience." If that be so, the "shortness of the time during which the "workman has been in the employment of his employer" (namely, in the same grade) made it "impracticable" to compute the rate of remuneration on a twelve months' average, and one is thrown back on the last words of s. 9, sub-s. 2 (i.), and the average for the less period is necessarily 46*s.* 3*d.* [*Perry* v. *Wright* (1); *Jury* v. *Owners of s.s. Atalanta* (2); *Barnett* v. *Port of London Authority* (3) were cited.] Moreover, the first sentence of s. 10, r. (i.), forms an overriding provision, empowering the Court to disregard the twelve months' average if that is not the period "best calculated to give the rate per "week at which the workman was being remunerated." On this ground also, the period from the date at which the increased rate became payable is the right one to take.

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(1) [1908] 1 K. B. 441.
(2) [1912] 3 K. B. 366.
(3) [1913] 2 K. B. 115.

Macaskie K.C. and *Bramley* (for *Drabble*, on war service) for the respondents. The arbitrator was right. The appellant was appointed a non-resident nurse-attendant in 1938 and she was still a non-resident nurse-attendant at the date of the accident. The fact that by mere lapse of time she became entitled to a wage increase is not such a change of grade, as would imply a step up in the hierarchy of employment under the corporation. [They referred to *Sales* v. *Abbott* (1).] The second point was not taken below, but it is clear that the "average weekly earnings" referred to in s. 10 must be the same as the "average weekly earnings for twelve months" in s. 9. It has always been the method of the Workmen's Compensation Acts to base compensation on an average figure not on the actual earnings at the date of the accident.

Cur. adv. vult.

1941. April 8. The following judgments were read:

SCOTT L.J. The appellant became entitled in December, 1939, by reason of an accident arising in the course and out of her employment, to weekly compensation for total incapacity which continued for about two months. The issue in the case is whether she was entitled to have her compensation under the Act based on her current rate of wages (including uniform) since September, 1939, or only on the average of her wages for the twelve months preceding the accident. The question is not an easy one to answer. My brethren differ. At first I was inclined to agree with my brother MacKinnon, but for reasons which I will state I now agree with my brother Luxmoore that we must allow the appeal.

The relevant provisions of the Act on the amount of

(1) [1916] W. N. 145; 9 B. W. C. C. 333.

compensation are all contained in ss. 9 and 10. Sect. 9 is mandatory. Sub-sect. 1 says that the weekly amount "shall "be calculated in accordance with the rules hereinafter "contained." Sub-sect. 2 states the rule for total incapacity in such a case as the present, namely, "a sum not exceeding "fifty per cent. of the workman's average weekly earnings "during the previous twelve months if he has been so long "employed by the same employer." The details of para. (ii.) which applied to the applicant do not affect the present point. Another rule "hereinafter contained" defines the phrase "employment by the same employer" as employment by the same employer in the same grade in which the workman was employed at the time of the accident. That is r. (iii.) of s. 10. Accordingly, if the appellant changed her "grade" when her remuneration was raised in September, 1939, the change made the ordinary twelve months' averaging provision of s. 9, sub-s. 2 (i.), inapplicable, but the county court judge held that she had not changed her grade. The rule which her counsel below and before us contended was applicable to the computation of her earnings was the first rule of s. 10. [His Lordship read the rule.] The first phrase to be construed is "impracticable at the "date of the accident to compute the rate of remuneration." In my opinion "the rate" there referred to is the twelve months' average of wages with the same employer mentioned in s. 9, sub-s. 2 (i.), both because r. (i.) of s. 10 is one of "the "rules hereinafter contained" to which s. 9, sub-s. 1, refers, and because "the average weekly earnings" to be "computed" according to s. 10, r. (i.), must be the same average earnings as are made the basis of computation by s. 9, sub-s. 2 (i.). It follows that, if the period of employment by the same employer in the same grade is less than twelve months, "the shortness of time" must render it "impractic-"able" to make the necessary computation. Where, however, you cannot get a twelve months' average of the workman's earnings with the same employer in the same grade, the proviso to the rule permits resort to the nearest parallel case, namely, another workman in the same grade for twelve months in the employment of the same employer, or, if that standard is not available, one employed in the same grade in the same class of employment in the same district. I do not think that the second exception in the proviso from the normal rule of s. 9, sub-s. 2 (i.), namely, " the terms of the employment " has any relevance in the present case.

My brother Luxmoore cites the relevant authorities, of which the judgment of Hamilton L.J. in *Barnett* v. *Port of London Authority* (1) is the most directly in point. The question of grade is usually one of mixed fact and law. In the present case it is almost wholly one of law, because the only evidence about the meaning of the word as used with regard to the relationship of the Sheffield Corporation with their staffs and workpeople is contained in a printed report defining the contractual terms of employment in August, 1939, with the recommendations of the relevant committees for changes of remuneration, which it was common ground before us had thereafter been acted on by the corporation and their employees in their contractual relations—in the case of the appellant from September 7, 1939. The meaning of the word " grade " as used by the corporation is, therefore, to be ascertained by the interpretation of the written document. It is on what seems to me on the whole the right construction of that document, that I have found myself in agreement with Luxmoore L.J., and unable to agree with MacKinnon L.J.

In considering the language of the document, however, it is well to bear in mind that the statute uses the two words " grade " and " class " in s. 10, r. (i.), as having different senses, the latter word being wider than the former when applied to employments. That differing rates of remuneration do not necessarily connote different grades I recognize, but remuneration may be one factor in such a difference, and on page 1 of the report it is noteworthy that the recommendations are made with a view to " the unification of "remuneration of various grades of staff and workpeople," which I interpret as meaning that the rates of remuneration are to be unified as between persons in the same grade.

(1) [1913] 2 K. B. 115, 128.

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The next point is that all "grades" other than those of the official staff are "classified" and "the council's general rules" are not to apply to workpeople except as provided in the scheme or any future subsidiary scheme to be approved in relation to any class of employee, thus echoing the statutory words in r. (i.) of s. 10. On page 6 is a table of classification, I think, for the purpose of designating the different classes. On pages 12–13 assistant nurses, resident and non-resident, are put into different categories where remuneration varies with years of experience. Precisely similar categories appear on pages 14–15 in the case of "nurse-attendants" like the appellant. On pages 20–21 all "grades" of "attendants" are apparently graded by years of experience, and some of them have their remuneration stepped up accordingly, and the very word "grade" is used. On pages 22–23 head-cooks are called "Grade 1," "Grade 2" and "Grade 3," the only expressed indications of the reasons for the grading being differences of pay. It is recommended that an "assistant "cook and housemaid" at one hospital be put into "Cook, "grade 3": and one seamstress be "graded 50*l.*–5–60," meaning at a wage of 50*l.* rising by instalments of 5*l.* to 60*l.* On pages 26–27 a non-resident relief foster-mother is to be "graded" as "an assistant foster-mother," and, apparently, get a rise of pay from 90*l.* or 95*l.* to 120*l.* or its equivalent in cash, board and lodgings. Standing alone, this recommendation would seem to give the name of "grades" to what I should have thought myself are "classes" and would be an argument in favour of the learned judge's view, but the real meaning of the word must be gathered from the whole document. I confess that the document is far less clear than it might be, but the initial and general distinction that it makes between "class" and "grade," following the distinction in the statute, inclines the balance of inference in favour of treating the three categories of nurse-attendants as grades; and the cogent argument of my brother Luxmoore as to the difficulty in practice of applying the analogous test of another person, whether in the employment of the same employer or of another employer in the same district, in order to arrive at the putative earnings for twelve months of the incapacitated workman, tips the balance definitely down in favour of construing the word " grade " as he construes it.

Counsel for the appellant addressed another argument to us of which there is no trace in the court below, namely, that the first three lines of r. (i.) of s. 10 are an overriding provision which requires the Court to reject the twelve months' average if it thinks it unfair in its operation. The answer to that argument is plain. The average referred to in those lines of the rule is the twelve months' average laid down by s. 9, and the first sentence of r. (i.) of s. 10 must be so construed. On this point it is to be borne in mind that the twelve months' average was enacted in the first Workmen's Compensation Act of 1897 and has been maintained ever since.

The appeal must be allowed with costs here and below.

MacKinnon L.J. [after stating the facts :] The respondents' case is that they arrived at the weekly payment to the appellant of 1*l.* 3*s.* by a literal and exact compliance with the terms of s. 9, and if that section stood alone there can be no doubt that they are right. The appellant, however, seeks to rely on the further provisions of s. 10. That provides rules to be observed " for the purposes of the provisions of this "Act relating to . . . . average weekly earnings." The argument for the appellant seems to be this : " At the date "of the accident, December 9, I had not been employed in "the grade in which I then was for twelve months. I had "only been so employed since the date in September when "my previous wage became increased to 2*l.* 6*s.* 3*d.*" (Whether that is the date when the change of " grade " is suggested, or the previous week when the original 2*l.* 0*s.* 5*d.* had become 2*l.* 5*s.* 11*d.*, or the week before that when the 2*l.* 0*s.* 5*d.* had been increased to 2*l.* 4*s.* 4*d.*, I am not clear.) " It is, therefore, "impracticable to apply to my case the average earnings for "twelve months, and resort should be had to the average "weekly earnings which during the twelve months previous "to the date of the accident was being earned by a person "in the same grade. That amount would be 2*l.* 6*s.* 3*d.*, the "amount I was being paid in December, 1939." (No question as to figures, on the rival contentions as to principle, has been raised. In fact, however, it appears that the *2l.* 6*s.* 3*d.* for a non-resident nurse-attendant in the second year of her service was only fixed by the corporation at the end of August, 1939, so that the average weekly earnings from December, 1938, to December, 1939, of a servant in that "grade," if it be a grade, was not necessarily *2l.* 6*s.* 3*d.*)

The only question raised in the arbitration was whether the appellant entered a new "grade" of employment in September, 1939. The arbitrator held that she did not. I agree with him. She was in December, 1939, what she had been from September, 1938, namely, a non-resident nurse-attendant, and all that happened in September, 1939, was that her weekly wage was increased. Very similarly I observe on page 16 of the report about the corporation servants that a non-resident porter is to have 55*s.* a week to start, rising to 57*s.* 6*d.* after two years, and 60*s.* after four years. It would be an abuse of language to say that a non-resident porter entered on a new grade of employment when his weekly wage was increased by 2*s.* 6*d.*, and on yet another grade when it was increased by a second 2*s.* 6*d.* So, in this case I think the grade of the appellant was that of a non-resident nurse-attendant with an annual increase of pay.

Mr. Sellers, before us, raised a further argument which apparently was not used below, and which I think was suggested to Mr. Sellers himself by a remark of my brother Luxmoore in the course of the argument. The opening words of s. 10, r. (i.), are "Average weekly earnings shall be computed "in such manner as is best calculated to give the rate per "week at which the workman was being remunerated." In this case, it was said, we know that in December, 1939, the workman's regular and agreed wage was *2l.* 6*s.* 3*d.* It is, therefore, simple and easy to take *2l.* 6*s.* 3*d.* as the "average "weekly wage," and such a computation is "best calculated "to give the rate per week at which the workman was being

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"remunerated." It is, I think, somewhat surprising that the Act does not provide that where the workman is by his contract of employment being paid a certain weekly sum at the time of his accident that sum shall be the amount on which to assess his compensation. But the Act does nothing of the sort. Sect. 10 provides a definition of "average weekly "earnings." The very phrase imports the adding up of a number of weekly earnings and the division of the total by that number, and in truth the definition or explanation of "average weekly earnings" refers back to s. 9. In that section the phrase is "the workman's average weekly earnings "during the previous twelve months," and in full the shortened phrase in s. 10 should be: "The workman's average weekly "earnings during the previous twelve months shall be "computed," etc. For better or for worse the Act has based the calculation of compensation on the average of earnings for the previous twelve months and has deliberately abstained from basing it on the amount of the weekly wage which by any agreement is in fact being paid at the date of the accident. The respondents have rightly calculated the compensation on this average for the previous twelve months, and, unless the appellant can succeed, as I think she does not, in saying that it is impracticable to resort to that method since she has not been employed for twelve months in the same grade, I think she has no other means of impugning the assessment of her compensation adopted by the respondents.

In the result, I think this appeal should be dismissed.

Luxmoore L.J. [after stating the facts as set out above:] In my judgment the substantial question to be determined is whether there was a change in the grade of the appellant's employment on September 21, 1939. If there was, it seems to me to be settled by the decision of this Court in *Perry* v. *Wright* (1) that in the case of a person whose grade of employment is changed during the period of twelve months immediately preceding the accident, the basis of compensation is the weekly average ascertained, not over the full twelve months, but only over the period from the date of change of grade to the date of the accident. This is the necessary result of the importation into r. 1 in s. 9, sub-s. 2, of the Act of the definition contained in r. (iii.) of s. 10, namely, "employment by the same employer in the grade in which "the workman was employed at the time of the accident."

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(1) [1908] 1 K. B. 441.

It is a question of law whether on the facts as found there has been a change of grade within the meaning of the Act: see *Jury* v. *Owners of s.s. Atalanta* (1). While it is true, as Fletcher Moulton L.J. said in *Perry* v. *Wright* (2), that a change of wages does not necessarily indicate a change of grade, yet I think it is a fact which must be taken into consideration in determining whether there has been such a change, and it is not unimportant to ascertain whether the change of wages is temporary or reasonably permanent. In my judgment, considerable light is thrown on the problem whether there has been a change of grade in the present case by a consideration of the judgments of Buckley L.J. and Hamilton L.J. in *Barnett* v. *Port of London Authority* (3). The evidence in that case was that the Port of London Authority employed at the London Docks two classes of casual labourers, those who had "B" tickets entitling them to be called on next after the permanent men had been employed, and those known as "extra casual" labourers who had no tickets and were not called on until both the permanent men and the "B" casual labourers had been employed. The pay per hour of the "B" casual labourers and the extra casual labourers was identical. Buckley L.J. said (4): "In my "judgment there has been misdirection. The county court "judge has directed himself that the B labourers and extra "casual labourers are in the same grade. This, I think, is "wrong in law. The words of the Act are 'a person in the "'same grade employed at the same work.' These two "classes of persons were employed at the same work but "not in the same grade. I may picture the two classes of

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(1) [1912] 3 K. B. 366.
(2) [1908] 1 K. B. 441, 457.
(3) [1913] 2 K. B. 115.
(4) Ibid. 124.

"labourers as standing on a staircase, and the question is "whether the B labourer and the extra casual labourer stood "on the same step or whether the one stood a step above "the other. The B labourer was a person who had a ticket "which entitled him to be called on before the extra casual "labourer. The latter class got no work until the former "class was exhausted. This was, in my judgment, a difference "of grade. The B labourer enjoyed an advantage personal "to himself which gave him a claim to employment before "the extra casual labourer had a chance. . . . . . The B "labourer was of a grade superior to that of the extra casual "labourer. If the extra casual labourer so conducted himself "as that he acquired a registered ticket and became a B "labourer he would have changed his grade." Hamilton L.J. said (1): "The legal meaning of the word 'grade' is a "matter of law; the tests by which the existence of a grade "may be ascertained are matters of law; but whether a "grade exists or not is a question of fact in each case. Grade "or no grade does not depend on the arbitrary nomenclature "of single employers apart from all other circumstances, "but there may be cases where the classification adopted "by a single employer, even among men whose actual "work is similar, may amount to a graduation of the men "in regard to conditions and regularity of employment "and rates of pay so widespread and so distinct as to "come within the term 'grade' as used in the Act, the "similarity of the work and the identity of their generic "name notwithstanding."

Apply the passages I have read to the present case. The non-resident nurse-attendants were formerly classified by the corporation in four categories, but since the adoption of the report already mentioned they are now classified in three categories. Each category is paid a fixed weekly wage, but the amount of that wage varies with the length of experience. Any person cognisant of the corporation classification can say at once either into which category a non-resident nurse-attendant is to be placed if he is told what her fixed weekly

(1) [1913] 2 K. B. 128.

wage is, or what her fixed weekly wage is if he is told how long experience she has had. Suppose an assistant nurse was injured in the first week of her employment in such circumstances as would entitle her to receive compensation under the Act, and because (to use the words of the proviso to s. 10, r. (i.), by reason of the shortness of the time during which she had been in the employment of the corporation, it was impracticable at the date of the accident to compute the rate of remuneration, and, therefore, it was necessary to have regard to " the average weekly amount which, during the "twelve months previous to the accident, was being earned by "a person in the same grade employed at the same work " by the corporation, it would be plain that any non-resident nurse-attendant could not be selected without regard to the classification of the corporation. It would be necessary to ascertain into which category the injured nurse fell, either by reference to her experience or by reference to the fixed weekly wage which the corporation had agreed to pay and was in fact paying to her. In the light of the authorities to which I have referred, I think that, although the work done by all non-resident nurse-attendants may be the same—there is no direct evidence on this point—yet the facts that they are paid a fixed weekly wage which varies according to the length of experience and that the Sheffield Corporation has itself made a classification of such nurses, is sufficient to amount to a graduation of the non-resident nurse-attendants in its employment by reference to their experience and rates of pay so distinct as to constitute separate grades in the sense in which that word is used in the Act notwithstanding (to use the words of Hamilton L.J. already quoted) the similarity of the work and the identity of their generic name.

For these reasons I think the appeal should be allowed. The award must be set aside with a direction that an award be made in favour of the appellant ordering the Sheffield Corporation to pay to her the sum of 1*l*. 4*s*. 1*d*. per week during the period of total incapacity, credit being given for the amounts already paid. The Sheffield Corporation must pay to the appellant her costs of this appeal and of the arbitration.

Appeal allowed.

Solicitor for appellant: *W. H. Thompson.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for E. B. Gibson, Town Clerk, Sheffield.*

J. W. H.

1941
Mar. 24, 25.

CORBETT *v.* DUFF (INSPECTOR OF TAXES).

DALE *v.* DUFF (INSPECTOR OF TAXES).

FEEBERG *v.* ABBOTT (INSPECTOR OF TAXES).

Revenue—Income tax—Profit or gains—Professional footballers—Benefit money paid by club—Payment on transfer of presumed accrued share of benefit—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.

Three professional football players were assessed to income tax in respect of certain benefit payments made to them by clubs which had employed them in accordance with the rules of the Football Association and the regulations of the Football League. One player was granted by his club a benefit match, the net proceeds of which amounted to 242*l.* 10*s.* The club made the sum up to 350*l.* which was paid to the player on various dates more than a year later. Another player was transferred by his club to another club, and was paid by the club transferring him 200*l.* out of the transfer money, as an accrued share of benefit. The third player, after playing for his club continuously for more than five seasons, was paid by the club 650*l.* as benefit. These benefit payments, though not obligatory, are expected by the players, are generally asked for, and usually accorded. They are made after a certain number of years' service, and are stated in the regulations of the Football League to be for loyal and meritorious service :—

Held, that all the payments in question were made in respect of and as remuneration for the players' employment as football players and that they were therefore taxable.

CASES stated by General Commissioners of Income Tax.

At meetings of the commissioners for the division of Manchester held on December 6 and 29, 1939, Frederick William Corbett appealed against additional assessments to income tax under Sch. E of Sch. I. to the Income Tax Act, 1918, in the sum of 40*l.* for each of the five years ending April 5, 1932 to 1936 inclusive, in respect of a sum of 200*l.* paid to him as a professional footballer by the Manchester City Football Club in the circumstances hereinafter mentioned, and William Dale appealed against additional assessments to income tax under Sch. E in the sum of 130*l.* for each of the five years ending April 5, 1933 to 1937 inclusive, in respect of a sum of 650*l*. paid to him by the club as a professional footballer. At a meeting of the commissioners for the division of Nottingham held on May 10, 1938, Alfred Feeberg appealed against additional assessments made on him as follows: 1930–1, 35*l*.; 1931–2, 70*l*.; 1932–3, 70*l*.; 1933–4, 70*l*.; 1934–5, 70*l*.; 1935–6, 35*l*.; 1936–7, 14*l*. Excepting the last all the assessments were made on Feeberg under Sch. E of Sch. I. to the Income Tax Act, 1918, in respect of employment as a professional footballer and were made in respect of a sum of 350*l*. called "benefit" money. The last of the assessments was made under Sch. D in respect of interest on the 350*l*.

The following facts were proved or admitted.

By an agreement dated April 20, 1931, made between the Manchester City Football Club and the appellant, Corbett, Corbett agreed to play for the club on the terms and conditions therein mentioned. Agreements in substantially the same form were entered into between the club and Corbett on April 27, 1932, May 5, 1933, May 7, 1934, and May 3, 1935. The last of these agreements expired on May 2, 1936. The club was a member of the Football Association, Ld. (hereinafter called "the association") which is an association consisting of such clubs and associations, playing association football and being otherwise qualified according to the laws of the game as settled by the International Football Association Board and the rules, regulations and byelaws of the association, as the council of the association might approve. The club was also a member of the Football League, Ld. (hereinafter called "the league") which is a combination of forty-four football clubs. The regulations of the league varied in certain trivial details in the several years material hereto, but the quotations therefrom given below were substantially accurate for the purposes of the case.

The agreement of April 20, 1931, provided (inter alia): "(4.) The player shall observe and be subject to all the rules "regulations and byelaws of the Football Association and any "other association, league or combination of which the club "shall be a member." A similar provision occurred in each of the other agreements between the club and the appellant. Rule 30 of the rules of the association provided for the registration of professional players by the Association and that players might be transferred from one club to another. Rule 31 provided that clubs might enter into agreements with and register professional players for certain specified periods. The regulations of the league provided (inter alia) :— Regulation 61 : "Clubs may enter into agreements with "players after three playing seasons' continuous service "providing for a benefit after five playing seasons' con"tinuous service. All benefits must be sanctioned by the "management committee, but shall not exceed 650*l*. Players "shall be qualified for a second benefit after ten playing "seasons' continuous service. All benefit moneys must be "paid over to players within 14 days, or if left in the hands "of the club a definite and written agreement must be entered "into and a copy furnished to the league within 14 days "of the benefit becoming due and sanctioned. The service "referred to in this rule must be substantially with the first "team. Benefits to other players must be proportionately "smaller, and sanctioned by the management committee "before promised . . . . Collections, subscriptions and the "sale of tickets to augment benefits may be permitted by the "management committee subject to certain rigid conditions." Regulation 63 : "When a player is transferred, or gives up "playing football, or ceases to play for the club, the club "may, with the consent of the management committee, as "a reward for loyal and meritorious service, give to such "player in lieu of presumed accrued share of benefit a "percentage of the amount which the club has guaranteed, "or would have been likely to guarantee, such player for a "benefit reckoned upon the playing seasons of service in "proportion to the qualifying period for a benefit with such "clubs reckoned as follows : Less than one season's service, "at the rate of 70 per cent. of the presumed accrued share "of benefit. After one season's service, 75 per cent. After "two seasons' service, 80 per cent. After three seasons' "service, 85 per cent. After four seasons' service, 90 per cent.

"After four and a half seasons' service, 95 per cent. After "five seasons' service, 100 per cent. Examples: If a club "usually guarantees 350*l*., after seven playing seasons' service "the amount which could be approved would not exceed 50*l*. "for each playing season of service. If a club usually "guarantees 500*l*. after five playing seasons' continuous "service, the amount which could be approved would not "exceed 100*l*. for each playing season of service, and would "in all cases be reckoned on the above scale of percentages. "In estimating the period of service the fractional part of a "playing season may be reckoned, but sanction will not be "given unless the player has played for the club for at least "four months of the playing season. . . . ." No payment (other than wages, talent money, bonus or removal expenses) could be made by a club to a player under the regulations except under regs. 61 or 63.

On May 4, 1936, the Manchester City football club included Corbett in the list of players who were open to transfer, putting on him a transfer fee of 750*l*. Terms were eventually arranged for his transfer to Lincoln City football club for 300*l*. Application having been made to the management committee of the league and permission having been obtained, 200*l*. was paid by the Manchester City club to Corbett on August 25, 1936, as an accrued share of benefit.

A statement which was attached to the case showed all the benefit payments made by the Manchester City club between March, 1934, and April, 1939, no figures being available for earlier years. A letter attached to the case showed the number of players registered with the club and the number transferred from the club in each of the football seasons from 1931–32 to 1939–40. It appeared from these figures that of approximately forty-one club players transferred in the five years 1934–35 to 1938–39, twenty-one (or fifty-one per cent.) received benefits or accrued shares thereof. It was stated in evidence by the secretary of the league that he regarded the payment made to Corbett of 200*l*. as an accrued share of benefit paid under r. 63 of the league rules. It was well understood among footballers that, if a player served a club for five years, he was likely

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to get a benefit, or, if he was transferred before five years, to get an accrued share thereof. The likelihood was the stronger if the club, like the Manchester City club, was financially prosperous. It made no difference to a player whether he got the full benefit in respect of five years' service with the club or an accrued share in respect of a part thereof. About half the number of players transferred received a benefit or accrued share thereof on transfer.

No formal agreement was made between the Manchester City club and Corbett for the grant of a benefit to him, but when he first entered into an agreement with the club he was told that he could take it as understood that if he played in one hundred and thirty matches in the first team in five years he would get a benefit. During his period of service with the club (for one year of which he did not play in any match on account of illness) he played in one hundred and ten first team matches.

The League supplied a statement setting out for each of the five appeal years (*a*) the number of players registered; (*b*) particulars of benefit money paid after five years' service otherwise than on transfer; (*c*) particulars of payments on transfer. It appeared from those figures that of 1590 league players transferred in the five years 1931–32 to 1935–36, 855 (or fifty-three per cent.) received benefit. Most transfers of players occurred during the season. In such a case the player concerned had no knowledge of the transfer fee and was only asked on what terms he was willing to be transferred.

The facts with regard to the appellant, Dale, were as follows. By an agreement dated December 23, 1931, made between him and the Manchester City football club, Dale agreed to play for the club on the terms and conditions therein mentioned. Agreements in substantially the same form were entered into between the club and Dale on December 23, 1931, April 27, 1932, May 5, 1933, April 27, 1934, April 18, 1935, April 8, 1936, and April 29, 1937. The agreement of December 23, 1931, provided (inter alia) that the player should observe and be subject to all the rules, regulations and byelaws of the Football Association and any other association, league or combination of which the club should be a member. On March 13, 1937, the club paid to Dale a benefit of 650*l*. No formal agreement was made between the club and Dale for the grant of a benefit to him, but it was admitted on Dale's behalf that he went to the club understanding the likelihood of getting a benefit in due course. In addition to the 650*l*. (which alone was the subject-matter of the appeal) Dale received 500*l*. from the Manchester United football club in or about December, 1931, when he was transferred from that club to the Manchester City football club, and he received 100*l*. from the Manchester City football club in August, 1938, shortly after his transfer to Ipswich Town football club.

The Commissioners found that the 200*l*. received by Corbett, and the 650*l*. received by Dale were wages earned by each of them as a professional footballer and they dismissed the appeals.

The facts with regard to the appellant Feeberg were that since May, 1929, he had been employed under yearly service agreements by the Notts County Football Club. Each of the yearly agreements were in similar terms. By clause 4 of the agreement Feeberg was subject to the rules of the Football League, Ld. Since 1929 Feeberg had been a consistently successful player in the first team of the club and had been popular with the public, the fellow members of his club, and the directors. In the sixth year of his employment he asked the directors to grant him a benefit match and pressed his request. In the end he was given a friendly match and not a league match.

It was usual for good players to ask for a benefit. The readiness of a club to grant a benefit depended to a certain extent on the financial position of a club, and the financial position of the Notts County football club was the reason why Feeberg was given a friendly, and not a league, match. The minutes of a meeting of the directors of the club held on April 24, 1935, recorded that: "It was agreed that a "benefit match be granted Feeberg next season, but without "guarantee." A friendly match for the benefit of Feeberg was arranged between the Heart of Midlothian club and a

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team of the Notts County football club to be played on the evening of September 30, 1935. On September 4, 1935, the directors of the club agreed that a sum not exceeding 350*l*. be given to Feeberg. The money for the tickets for the match (20*l*. 10*s*.) and the gate money (266*l*. 5*s*.) were received by the club. The 350*l*. was paid to Feeberg by the club on various dates between August 14 and December 11, 1936, and no part of it was received by him from any other source. Of the 350*l*. the club contributed 107*l*. 9*s*. 2*d*. under their guarantee. Payments by way of benefit made by clubs to their players were commonly of two kinds: (*a*) a benefit, which might either be (i.) the actual proceeds of a particular match, to which in some cases the club might make an addition either under a voluntary guarantee, or gratuitously, or (ii.) an absolute cash payment unrelated to any match; and (*b*) a payment made under r. 63 "in lieu of presumed "accrued share of benefit," given to a player who was about to be transferred from a club with which he had not been long enough in service to receive a full benefit. Payments could only be made to players in accordance with the rules of the Football League. It was stated by Feeberg that he did not see that there was any difference between a benefit or an accrued share of benefit if the player received the money. A successful player always had an expectation of a payment whether he remained with the club or was transferred. It was stated by the Secretary of the Association of Football Players and Trainers' Union that the distinction between "benefit" and "accrued share" was a difference of name only. In the twenty years before the appeal the Notts County football club had granted not more than seven other benefit matches to players of long service. Each of those matches was a league match and an ordinary fixture of the club. No statistics were given in evidence of other payments by way of benefit made during a comparable period by the club. The club at all material times was in either the Second Division or the Third (Southern) Division of the Football League. That league had four divisions, each containing twenty-two clubs, and each club employing some thirty players. No statistics were given in evidence, but witnesses for Feeberg stated that successful professional footballers expected to receive, and had a good chance of receiving, some form of benefit money in the course of their career, and that players who played mainly for the first team of their club and so proved themselves capable of commanding transfer fees, did generally on transfer obtain grants under r. 63 of the League rules. It was stated that large numbers of payments were made to footballers playing under the league rules on transfer or otherwise. That fact was well known to all footballers, who were not backward in asking for a payment.

The commissioners confirmed the assessments "as the "receipt of the sums of 350*l.* and 14*l.* in the opinion of the "commissioners form part of the appellant's emoluments or "profits of employment."

The appellants requested the commissioners to state this case for the opinion of the High Court.

Goldie K.C. and *R. W. Leach* for all the appellants. In Feeberg's case the commissioners drew a wrong inference from the facts, and misdirected themselves in law. In granting the benefit match to him the club placed themselves under no obligation, since it was granted "without guarantee," although in fact they made the amount up to 350*l.* This was, however, a free gift, and a gift cannot be an emolument. There must be some basis to an emolument, thus the customary present to the jockey who wins the Derby, which is sometimes as much as 1000*l.*, may be an emolument. Here the club held the money for a year, and at no time during that period was the appellant entitled to claim it. It was a pure gift. The word "emolument" does not occur in r. 1 of Sch. E, but the commissioners used it in their findings. Nor was this payment a perquisite, for there must be some basis of right, though not enforceable, to constitute a perquisite, e.g., the customary right of a gyp at Cambridge University to unconsumed battels. There was nothing said about a benefit in the appellant's agreement with the club. There is a fundamental distinction between this case and *Blakiston* v. *Cooper* (1) which referred to Easter offerings. These are made annually, and have no reference to the personality of the clergyman, although that may affect the amount. This case is covered by *Seymour* v. *Reed* (2) where the proceeds of a benefit match for a professional cricketer were held not to be taxable. In *Davis* v. *Harrison* (3) the footballer had a right under his agreement to a benefit. In Corbett's case the commissioners drew a completely wrong inference from the facts. The transfer money was paid to him in recognition of long and meritorious service. Therefore, it was neither an agreed share of transfer money nor wages. That distinguishes his case from *Davis* v. *Harrison* (3) and from Feeberg's case herein. In Dale's case the money handed to him was a gift. The case states that he was " likely " to have a benefit, but that is not enough. To render the benefit money which a player receives taxable as being part of his wages there must be an agreement that he shall receive a benefit. The reward might have taken the form of a piece of plate or a motor car, which would have been in the nature of a capital payment.

Sir William Jowitt S.-G. and *R. P. Hills* for the Crown. The question raised here depends on whether the money was earned by the appellants in their office or whether it was in the nature of donations to them personally : per Rowlatt J. in *Reed* v. *Seymour* (4). Rowlatt J. there pointed out that the largeness of the sum, the fact that it was only granted once in a cricketer's career, the fact of the subscriptions, the fact that it was liable to a trust, and the fact that the exceptional sum was collected for him as an endowment when his career as a cricketer should be over, pointed to the conclusion that it was not an income profit and gain, but was a donation, a testimonial of an exceptional kind. The decision of Rowlatt J. was restored by the House of Lords (5) where Lord Cave L.C. said (6) that the words in r. 1 of Sch. E,

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(1) [1909] A. C. 104.
(2) [1927] A. C. 554; 11 Tax Cas. 625.
(3) (1927) 137 L. T. 324; 11 Tax. Cas. 707.
(4) [1926] 1 K. B. 588, 593.
(5) [1927] A. C. 554.
(6) Ibid. 559.

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"salaries, fees, wages, perquisites or profits whatsoever there-"from" "include all payments made to the holder of an "office or employment as such, that is to say by way of "remuneration for his services even though such payment "may be voluntary, but that they do not include a mere "gift or present (such as a testimonial) which is made to "him on personal grounds and not by way of payment for "his services." The Lord Chancellor went on to say (1) that "the whole sum—gate money and subscriptions alike—is a "testimonial and not a perquisite. In the end—that is to "say when all the facts are considered—it is not remuneration "for services but a personal gift." But the facts set out in the present three cases differentiate them from *Seymour* v. *Reed* (2). It is stated here that the payments for benefits, although the football clubs are not bound to make them, are expected by the players, are generally asked for and are usually made by the clubs; that they are made after five years' continuous service, and are stated in the Football League regulations to be for loyal and meritorious services; and that in some cases payments are made in lieu of a presumed accrued share of benefits. The question whether a payment is a personal gift or is remuneration is largely one of fact. Here there is a finding by the commissioners that the sums were paid to the appellants as wages earned by them as professional footballers. In view of that finding the decision of the commissioners is not wrong in law.

Goldie K.C. replied.

Cur. adv. vult.

LAWRENCE J. [after stating the facts:] It is contended on behalf of the appellants that the sums received by them were not made in pursuance of any formal agreement such as is provided by regulation 61 of the Football League, but that they were gifts analagous to the sum invested for the cricketer Seymour in *Seymour* v. *Reed* (2). The principle to be applied is stated in that case by Rowlatt J. (1) and by Lord Cave (2); and by Lord Loreburn in *Blakiston* v. *Cooper* (3), namely, that if the payment, though voluntary, is remuneration for the office or employment it is taxable, but that if it is personal in the sense that it is given to the person, not as the holder of an office or employment, but as a personal testimonial, it is not. It is obvious that the line is often difficult to draw. The clergyman who is personally admired and respected by his parishioners would probably receive larger Easter offerings than one who is not, and in this sense the gift is personal, but the occasion is annual and is connected with the clergyman's office, and it was, therefore, held in *Blakiston* v. *Cooper* (4) to be in respect of the office and not a personal testimonial. If the occasion of the gift had been the clergyman's retirement or his golden wedding, the decision would, I apprehend, have been the other way.

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(1) [1927] A. C. 560.

(2) [1927] A. C. 554; 11 Tax. Cas. 625.

In the present cases it appears to me that all the payments in question were made in respect of, and as remuneration for, the appellants' employment, and that they are taxable. As the cases stated and the Football League regulations indicate, the payments, though not obligatory, are expected, are generally asked for, and are usually accorded. They are made after a certain number of continuous years' service, and are stated in the regulations to be for loyal and meritorious services, and in special circumstances to be in lieu of a presumed accrued share of benefits. In my opinion, in face of the terms of regs. 61 and 63 and the facts stated in the cases as to the understanding among professional football players, it is impossible to hold that any of the payments to the appellants were not paid in respect of, and as remuneration for, the appellants' employment as football players.

The only difference between the present case and *Davies* v. *Harrison* (5) is that there a formal agreement under reg. 61 had been entered into, but that agreement was not acted upon,

(1) [1926] 1 K. B. 593; 11 Tax Cas. 630.
(2) [1927] A. C. 559; 11 Tax Cas. 646.
(3) [1909] A. C. 104, 107; 5 Tax Cas. 347, 355.
(4) [1900] A. C. 104; 3 Tax Cas. 347.
(5) 137 L. T. 324; 11 Tax Cas. 707.

and the case is really on all fours with Corbett's appeal.

A point was taken that the commissioners in Corbett's and Dale's cases had held the payments to be wages, but there is nothing, in my opinion, in this point, as, whether they are wages or perquisites or other profits, they arise, in my opinion, from the employment, and are paid in respect of, and as remuneration for, the employment.

The appeals will, therefore, be dismissed with costs.

Appeals dismissed.

Solicitors for the appellants: *Turner, Osborn & Chatterton, for T. H. Hinchcliffe & Son, Manchester.*

Solicitor for Crown: *Solicitor for Inland Revenue.*

R. F. S.

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LONDON ARMOURY COMPANY, LIMITED *v.* EVER READY COMPANY (GREAT BRITAIN), LIMITED.

Merchandise marks—Imported goods—Sale—Trade marks not accompanied by indication of origin—Breach—Penalty—Right of action—Merchandise Marks Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 53), *ss.* 1, 5.

By the Merchandise Marks Act, 1926, s. 1, sub-s. 1, where imported goods bear the name or trade mark of a manufacturer, dealer or trader, or the name of a place or district in the United Kingdom, they may not be sold, exposed for sale, or distributed by way of advertisement, unless such name or trade mark is accompanied by the appropriate indication of origin of the goods. By s. 5, sub-s. 1, a person guilty of an offence against the Act is liable on summary jurisdiction to a fine not exceeding 5*l.* (or on a subsequent offence 20*l.*) :—

Held, upon the scope and wording of the Act, that the remedy for breach thereof is confined to the penalties imposed by s. 5, sub-s. 1, and that the Act does not confer upon a person who is injured owing to a breach a right of action for damages or other relief.

The Act is designed to protect the home trade in the general interests of the United Kingdom, and even if the Act conferred the right to sue in the courts upon injured manufacturers or traders, this right would not extend for the protection of importers of foreign goods for sale in the United Kingdom.

TRIAL of point of law before Tucker J.

The plaintiffs were importers of electric torch batteries for sale in the United Kingdom. The defendants were manufacturers of a well known brand of electric torch batteries, advertised to the public and marketed under registered trade mark as "Ever Ready" batteries. They were also importers of electric torch batteries for sale in the United Kingdom.

The plaintiffs brought this action alleging that the defendants in or about the month of February, 1940, in breach of the Merchandise Marks Act, 1926, s. 1, unlawfully sold in the United Kingdom imported goods, being electric torch batteries, to which their name and trade mark of "Ever Ready" was applied, not being accompanied by an indication of origin within the meaning of that Act.

The plaintiffs alleged that the defendants had thus been able to sell and had sold imported goods as British made, and at prices applying to British goods, and that the plaintiffs had thereby been subjected to unfair competition and had suffered damage, which they estimated at 6000*l*.

The plaintiffs claimed an injunction to restrain the defendants from selling or exposing for sale or permitting to be sold in the United Kingdom imported torch batteries under the name or trade mark of "Ever Ready" unless accompanied by an indication of origin within the Merchandise Marks Act, 1926: they also claimed an account and damages.

The defendants by their defence alleged that the goods in question were not "imported goods" within the Merchandise Marks Act, 1926. Apart from denials, the defence stated (para. 4): "The defendants will object that the statement "of claim discloses no cause of action against them and that "the plaintiffs are not entitled in law to the relief claimed "or to any relief."

By a Master's order made on September 27, 1940, the points of law raised by the defendants in para. 4 of their defence were ordered to be set down for hearing and disposed of forthwith, and before the trial of the issues of fact in the action. Counsel for the defendants agreed that if and so far as might be necessary it should be assumed for the purposes of this issue that the plaintiffs had sustained some special damages as a result of the alleged contravention of the Merchandise Marks Act, 1926. Accordingly, the case came before Tucker J. upon the question of law raised by para. 4 of the defence.

Blanco White K.C. and *W. A. L. Raeburn* for plaintiffs. The action is maintainable. Prima facie a person who has been injured by the breach of a statute has a right to recover damages from the person committing the breach, unless it can be established, by considering the whole of the Act, that no such right was intended to be given: *Monk* v. *Warbey* per Greer L.J. and Maugham L.J. (1). On construction it

(1) [1935] 1 K. B. 75, 81, 84.

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appears that the Merchandise Marks Act, 1926, was passed for the protection, not only of British manufacturers, but also (inter alia) of British importers of foreign goods as foreign goods who can complain of unfair competition if foreign goods are sold as British. Sect. 1, sub-s. 1, clearly has this object since it deals with the marketing of goods, and s. 1, sub-s. 3, and s. 2, also show that this is the intention of the Act. The plaintiffs come within the class to be protected. Moreover, the penalty imposed by s. 5, sub-s. 1 (i.), for an infringement of the Act is a fine not exceeding 5*l.* in the case of a first offence and that is out of all proportion to the damage caused by a breach to importers who comply with the statute and to the public interest, and no part of any penalty imposed goes to the trader who has suffered damage. It cannot, therefore, be said that proceedings for the penalty are the only remedy for an offence against the provisions of the Act: *Groves* v. *Wimborne* (*Lord*), per A. L. Smith L.J., per Rigby L.J., and per Vaughan Williams L.J. (1). The Merchandise Marks Act, 1926, like the Factory and Workshop Act, 1878, which was before the Court in *Groves* v. *Wimborne* (*Lord*) (2), is a public Act passed in favour of (inter alia) a class to which the plaintiffs belong, to compel their competitors to do certain things for their protection and benefit. That being so, unless it appears from the whole purview of the Act that it was the intention of the Legislature that the only remedy for a breach of the statutory duty should be by proceeding for the fine imposed by the Act, it follows that, on proof of a breach of that duty, a cause of action is established: *Groves* v. *Wimborne* (*Lord*), per A. L. Smith L.J. (2). *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (3), is distinguished by reason of the terms of the statutory order there under review, but Atkin L.J. pointed out that an Act may create a duty which is owed to the public and may provide a penalty for its non-performance, and that the duty may still be owed to individuals (4).

G. O. Slade for defendants. Admittedly the question whether the plaintiffs can maintain their action depends on the interpretation of the statute. When the statute is construed as a whole it is apparent that the duty imposed by it is a public duty only so that no action for a private remedy for an infringement can be entertained. Throughout the Act reference is made to the public interest as distinct from private interest: see, for example, s. 1, sub-s. 3; s. 2, sub-s. 1; s. 2, sub-s. 5; while s. 6, which provides means by which an employer can exempt himself from the penalty on the conviction of the actual offender, clearly envisages that the only remedy contemplated by the Act for a breach of its provisions is a criminal one. Where an obligation is created by a statute to do something for the benefit of the public generally, or of a large body of persons, and where failure to comply with the statutory obligation is liable to affect all such persons in like manner, although not necessarily in the same degree, and a specific remedy for failure to perform the obligation is provided by the statute, there is no separate right of action to every person who is injured by a breach of the obligation, but the statutory remedy is the only remedy: *Clegg, Parkinson & Co.* v. *Earby Gas Co.*, per Wills J., and per Wright J. (1). See also *Phillips* v. *Britannia Hygienic Laundry Co., Ld.*, per Atkin L.J. (2). The penalty provided by s. 5, sub-s. 1 (i.), is not inadequate, for an action for an injunction against infringement of the statute can be brought by the Attorney-General at the relation of persons injured, *Attorney-General* v. *Premier Line, Ld.* (3): but that is the only way in which an injunction against the defendants could be obtained, not at the instance of the plaintiffs in the present proceedings. *Groves* v. *Wimborne (Lord)* (4) and *Monk* v. *Warbey* (5) are distinguishable, the object of the statutes there being the prevention of bodily injury to persons who, if injured, would reasonably be expected to be afforded means of recovering compensation. In those cases, too, the plaintiffs had suffered damage over and above the rest of the community, but that is not so here. As in *Square* v. *Model Farm Dairies*

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(1) [1898] 2 Q. B. 402, 408, 414, 416.

(2) Ibid. 406, 407.

(3) [1923] 2 K. B. 832.

(4) Ibid. 841.

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(1) [1896] 1 Q. B. 592, 594, 595.
(2) [1923] 2 K. B. 832.
(3) [1932] 1 Ch. 303.
(4) [1898] 2 Q. B. 402.
(5) [1935] 1 K. B. 75.

(*Bournemouth*), *Ld.* (1), where an action based on a breach of the Food and Drugs (Adulteration) Act, 1928, failed on the ground that the duty created by the Act was owed by the vendors of the goods there dealt with only to the purchasers thereof, the Merchandise Marks Act, 1926, is designed to regulate the sale of goods between vendor and purchaser, and, if anyone has the right to enforce a private remedy for an infringement of the Act, it is a purchaser only.

TUCKER J. This action is for breach of statutory duty imposed by Merchandise Marks Act, 1926, s. 1, sub-s. 1, which is in these terms: " It shall not be lawful to sell, expose "for sale, or, by way of advertising goods of some other kind, "distribute, in the United Kingdom, any imported goods to "which there is applied any name or trade mark being, or "purporting to be, the name or trade mark of any manufacturer, dealer or trader or the name of any place or "district in the United Kingdom, unless the name or trade "mark is accompanied by an indication of origin." By sub-s. 3: " If the Board of Trade are satisfied, after considering such representations (if any) as may be made to "them by any persons appearing to the Board of Trade "to have a substantial interest in the matter, that, having "regard to the special circumstances of the trade, difficulties "would arise if this section applied to goods of any class "or description, or goods sold under any particular designation, "and that public interests in the United Kingdom would not "be materially prejudiced by exempting such goods from the "operation of this section, they may direct that this section "shall not apply to such goods, or that goods shall not be "treated as falling under this section by reason only that "they are so designated."

[His Lordship read the statement of claim and para. 4 of the defence, and continued :] The result of the Master's Order of September 27, 1940 (above), is that I am dealing with the statement of claim, in effect, by way of demurrer, and every allegation in the statement of claim must be treated for purpose of this legal argument as admitted.

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(1) [1939] 2 K. B. 365.

The question is thus one which has frequently come before the Courts and is directed to the circumstances in which a private individual has a right of action for breach of a statutory duty. I refer to the authorities for the purpose of ascertaining the principles before proceeding to consider the particular Act in point here. In *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1), Willes J. said: "There are three classes of "cases in which a liability may be established founded upon "a statute. One is, where there was a liability existing at "common law, and that liability is affirmed by a statute "which gives a special and peculiar form of remedy different "from the remedy which existed at common law: there, "unless the statute contains words which expressly or by "necessary implication exclude the common law remedy, and "the party suing has his election to pursue either that or the "statutory remedy. The second class of cases is, where the "statute gives the right to sue merely, but provides no "particular form of remedy: there, the party can only proceed "by action at common law. But there is a third class, namely, "where a liability not existing at common law is created by a "statute which at the same time gives a special and particular "remedy for enforcing it." Then he proceeds later on to say: "The remedy provided by the statute must be followed, and it "is not competent to the party to pursue the course applicable "to cases of the second class."

The last words there used by Willes J. must be considered in the light of further decisions which modified that statement to some extent, and the extent to which it is modified is, I think, to be found very clearly expressed in the judgment of Atkin L.J. in *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (2), where he said: "In my opinion, when an Act imposes "a duty of commission or omission, the question whether a "person aggrieved by a breach of the duty has a right of "action depends on the intention of the Act. Was it intended "to make the duty one which was owed to the party aggrieved

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(1) (1859) 6 C. B. (N. S.) 336, 356. (2) [1923] 2 K. B. 832, 840, 841.

"as well as to the State, or was it a public duty only? That "depends on the construction of the Act and the circumstances "in which it was made and to which it relates. One question "to be considered is, Does the Act contain reference to a "remedy for breach of it? Prima facie if it does that is the "only remedy. But that is not conclusive. The intention "as disclosed by its scope and wording must still be regarded, "and it may still be that, though the statute creates the duty "and provides a penalty, the duty is nevertheless owed to "individuals. Instances of this are *Groves* v. *Wimborne* "*(Lord)* (1) and *Britannic Merthyr Coal Co.* v. *David* (2). "To my mind, and in this respect I differ from McCardie J., "the question is not to be solved by considering whether or "not the person aggrieved can bring himself within some "special class of the community or whether he is some "designated individual. The duty may be of such paramount "importance that it is owed to all the public."

In *Monk* v. *Warbey* (3) that statement of Atkin L.J. is quoted with approval, and Maugham L.J. uses these words: "Like Greer L.J. I think that the principle stated by Atkin L.J. "in that case"—that is *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (4)—"was correct and that the question whether the Act "or Order is intended to give or to exclude a private remedy "as the Lord Justice said, 'is not to be solved by considering "'whether or not the person aggrieved can bring himself "'within some special class of the community or whether he is "'some designated individual. The duty may be of such "'paramount importance that it is owed to all the public.'" and Maugham L.J. goes on to say: "The strongest case on "the other side is *Groves* v. *Wimborne (Lord)* (1). The cases "show that there are certain considerations for determining "whether the intention of the statute is to preclude private "remedy. First, the Court has to make up its mind whether "the harm sought to be remedied by the statute is one of the "kind which the statute was intended to prevent; in other

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(1) [1898] 2 Q. B. 402.

(2) [1909] 2 K. B. 146; [1910] A. C. 74.

(3) [1935] 1 K. B. 75, 85.

(4) [1923] 2 K. B. 832, 840, 841.

"words, it is not sufficient to say that harm has been caused "to a person and to assert that the harm is due to a breach "of the statute which has resulted in injury."

These are the principles which I have to apply in this case, and I therefore turn to ascertain whether the Act is one which provides a penalty. It does so provide in s. 5: "Every "person guilty of an offence against this Act shall be liable "on summary conviction to a fine not exceeding five pounds, "and in the case of a second or subsequent offence to a fine "not exceeding twenty pounds and the Court may in the "case of a second or subsequent offence order the goods in "relation to which the offence has been committed to be "forfeited." In this connection s. 6 provides: "Where an "employer or principal is charged with the offence of having "acted in contravention of, or failed to comply with, the "provisions of this Act or any Order in Council made under "this Act he shall be entitled on information duly laid by him "and on giving not less than three days' notice of his intention "to the prosecution to have any other person whom he charges "as the actual offender brought before the court at the time "appointed for hearing the charge, and, if after the com-"mission of the offence has been proved, the employer or "principal proves to the satisfaction of the court that he has "used due diligence to enforce compliance with the provisions "of this Act or of the Order, and that the said other person "had committed the offence in question without his consent, "connivance or wilful default, the said other person shall, "subject to the provisions of sub-s. 5 of the last preceding "section, be summarily convicted of the offence, and the "employer or principal shall be exempt from any penalty."

There is the penalty, and accordingly prima facie that is the only remedy. But that is not conclusive and I have to look at the whole Act to ascertain from its scope and wording whether it was none the less the intention of the legislature that a person injured by breach might have a remedy in the Courts by way of damages or injunction in addition to proceeding by way of s. 5 to enforce or secure a summary conviction.

I, therefore, turn to those sections of the Act to which I have been referred as throwing any light on this question. I observe that it is described as "an Act to require an "indication of origin to be given in the case of certain imported "goods." I have already referred to s. 1, and that section prohibits the sale of imported goods bearing a name or trade mark of a British manufacturer or trader unless it is accompanied by an indication of origin—an absolute prohibition against selling, exposing for sale or by way of advertising goods of that class. There is, however, a provision in sub-s. 3, whereby the Board of Trade can give exemption to certain goods from the operation of the section, after consideration of such representations as may be made to them by any persons appearing to the Board to have a substantial interest in the matter. Sect. 2 deals with a different class of goods, namely, goods which are imported but bear no mark or name upon them, and the procedure with regard to those goods is that an inquiry may be held after a request has been made. That section says: "After an inquiry in relation "to goods of any class or description has on a reference from "the appropriate department been held by a committee "appointed for the purposes of this Act and the report of the "committee on the matter has been taken into consideration "by the department, that department may, unless it appears "to them that the trade of the United Kingdom or the trade "generally of other parts of His Majesty's dominions with the "United Kingdom would be prejudiced if imported goods of "that class or description for use or consumption in the United "Kingdom were prohibited to be sold unless they bear an "indication of origin, make a representation to His Majesty "that it is desirable that an order should be made under this "section, and His Majesty in Council may thereupon, subject "to the provisions of this Act, make an Order prohibiting "the sale, or the exposure for sale in the United Kingdom, "of imported goods of that class or description unless they "bear an indication of origin." There follow provisions with regard to the sitting of the committee, and sub-s. 3 provides: "No reference shall be made to a committee in respect of goods "of any class or description unless there has been made to "the department an application therefor which, in the opinion "of the department, substantially represents the interests "of either manufacturers, producers, dealers, traders, users, "or consumers, or of any body of wage-earners." By sub-s. 5: "If on an inquiry under sub-s. 1 of this section it appears to a "committee to be desirable that any imported goods should "bear an indication of origin at the time of importation, and "the committee so reports to the appropriate department, that "department unless, having regard to all the circumstances of "the case, including the re-export trade of the United Kingdom "in that class or description of goods, it considers such action "undesirable, may make a representation to His Majesty "that it is desirable that the goods should bear an indication "of origin at the time of importation," and sub-s. 5 then provides that an Order may accordingly be made in Council. Then sub-s. 6 provides: "A committee after hearing persons " representing such interests as may appear to the committee "to be substantially affected shall, from time to time, and as "soon as may be practicable in each case after an inquiry "under sub-s. 1 of this section make reports to the appropriate "department specifying the classes or descriptions of imported "goods, if any . . . . with respect to which, in the opinion "of the committee, an Order in Council ought to be made "under this section, and the committee shall if it reports that "such goods should bear an indication of origin, recommend "what should be the form of the indication of origin and in "what manner it should be applied to the goods." I have already referred to ss. 5 and 6, and of course it is necessary to look at the Act as a whole.

It is argued for the plaintiffs that looking at the Act as a whole I ought to come to the conclusion that it is an Act designed to benefit and protect three classes of people; first, people who want to use an English trade mark on imported goods; secondly, people who sell English goods under an English trade mark, and, thirdly, those who sell imported goods as foreign goods, and that if anyone can bring himself within any one of those classes and it can be shown that he suffers damage, he has a right of action. He further relies on the fact that the penalty provided by s. 5 is in his submission a small one which might not be very effective for the purpose of securing the results desired or, at any rate, might not be commensurate with the damage suffered by persons of the classes for whose protection he says the Act was designed.

Now I have considered the scope and wording of the Act as a whole, and I think it is an Act designed for the benefit of the whole trade of this country, and there are numerous references in the Act to the public interest in the United Kingdom. In s. 1, sub-s. 3, there are the words: " and that "public interests in the United Kingdom would not be "materially prejudiced by exempting such goods " and similar words appear in s. 2: " unless it appears to them that the "trade of the United Kingdom or the trade generally of other "parts of His Majesty's dominions with the United Kingdom "would be prejudiced." In s. 2, sub-s. 5, the expression occurs: " unless, having regard to all the circumstances of "the case, including the re-export trade of the United "Kingdom in that class or description of goods, it considers "such action undesirable." I think generally speaking it is clear that the design of the Act was to protect the home trade in the general interests of this country, but I can find nothing in the Act which satisfies me that it was the intention of the legislature that any person, who suffers damage by reason of a breach of the Act, should have any remedy in addition to that which is provided by the Act itself in s. 5. This kind of case is in my opinion very different from cases like *Groves* v. *Wimborne* (*Lord*) (1), *David* v. *Britannic Merthyr Coal Co.* (2), and *Monk* v. *Warbey* (3), where people have perhaps suffered serious personal injuries and where such persons could derive no comfort or protection from the fact that those who had caused their mutilation through a breach of statutory duty might be liable to be fined by a court of summary jurisdiction. In those cases it is not surprising to find the courts holding that such persons, being persons for whose protection the Act has been passed, should not be confined to their remedy of proceeding by way of summons in a petty sessional court. I think this Act is a different kind of Act, and persons who suffer in their trade from breaches of this Act are in a very different position from workmen or other people who may be injured, as in the cases to which I have referred. Therefore, I have come to the conclusion that this Act of Parliament is not one by which the Legislature must be taken to have intended to confer upon persons who have suffered through breaches of the Act the right to sue in the courts as well as to proceed before justices.

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(1) [1898] 2 Q. B. 402.
(2) [1909] 2 K. B. 146.
(3) [1935] 1 K. B. 75.

But there is a narrower ground upon which the defendants would be entitled to succeed. Assuming that there may be some traders or persons who could bring an action for breach of this statute, in my view the plaintiffs do not come within that class of persons. The plaintiffs in this case are simply described in the statement of claim as "large importers of electric torch batteries for sale in the United Kingdom." Whatever may be the position under this Act with regard to persons who manufacture goods within the United Kingdom, in my view the Act was not designed for the protection of importers of foreign goods for sale in the United Kingdom. The plaintiffs are in effect saying: "We and the defendants before this Act was passed were "entitled to import into this country goods to which there "was applied a 'name or trade mark, being or purporting "'to be the name or trade mark of any manufacturer, dealer "'or trader or the name of any place or district in the "'United Kingdom.' We have kept the law, but the defendants "have not, and, therefore, we are entitled to damages and an "injunction." In my view they cannot maintain that position. I think that, even if I am wrong on the broader ground on which I have decided this case, the plaintiffs would fail to show that they, being merely importers of foreign goods, could in any case come to the Court and complain of a breach of this statute and recover damages.

There is only one further matter to which I need refer and that is this. Mr. Slade cited to me the *Attorney-General* v. *Premier*

Line, Ld. (1). That was a case which arose under the Road Traffic Act, 1930, whereby the maintenance of certain coach services was prohibited except under licence. In that case the defendants began to operate a service of express coaches between London and Aylesbury and they applied for a road service licence. That application was refused, but none the less they continued to maintain the service. They were prosecuted and convicted, and despite the conviction, they still continued to maintain the service. An action was brought by the Attorney-General at the relation of other motor coach owners holding licences to operate on the same route for an injunction to restrain the defendants from continuing their service. Eve J. in giving judgment said: "The general rule is that "where an Act creates an offence and provides a remedy the "only remedy is that provided by the statute, and had this "action been commenced and prosecuted by the relators it is, "I think, pretty clear that the objection of the defendants to "the maintenance of this action would have prevailed." That case none the less shows that in a case like the present, where a public duty is imposed upon traders, if they repeatedly or deliberately disregard the Act, despite conviction at petty sessions, there remains the remedy which can be pursued by the intervention of the Attorney-General by way of an injunction. I think that that is a relevant matter to be considered when one is having regard to s. 5 and the argument that the penalty is so small.

For these reasons I decide that para. 4 of the defence is a good and valid plea, and that the statement of claim does not disclose any cause of action. The action is accordingly dismissed.

Judgment for defendants.

Solicitor for plaintiffs: *A. L. Solomon.*
Solicitor for defendants: *Bentleys, Stokes & Lowless.*

(1) [1932] 1 Ch. 303, 313.

F. P. F.

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